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## ARTICLES

### LUCIFER'S FIASCO: LAWYERS, LIARS, AND L'AFFAIRE LEWINSKY

*Rob Atkinson*

*"Readers are advised to remember that the devil is a liar."*

—C.S. Lewis<sup>1</sup>

*"There is a truth which is of Satan."*

—Dietrich Bonhoeffer<sup>2</sup>

#### INTRODUCTION

MY contribution to the symposium is, I am afraid, a bit Munorthodox. It is an e-mail from a senior lawyer in the Lewinsky matter to one of his subordinates, apparently sent to me by mistake.<sup>3</sup> In some respects, it is the "feedback" of every young lawyer's dreams—prompt, detailed, and didactic. More generally, however, it is a subordinate lawyer's worst nightmare: a stern, occasionally sarcastic, dressing-down for the most fundamental, yet wholly unforeseen, mistakes. To us, on the other hand, it offers otherwise unobtainable insights into the strategy of a group of counsel whose role in the impeachment process and its antecedent events was widely suspected but impossible to confirm—until now.

Mindful of the jocular advice of my undergraduate Old Testament textbook—"the Bible . . . throws a lot of light on the commentaries!"<sup>4</sup>—I have chosen to let the e-mail speak largely for itself, framed only by this introduction and a brief concluding

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\* Professor of Law, Florida State University. I very much appreciate the diligent research work of Philip Fowler, Wes Haber, and Jennifer Littleton. My colleagues Charles Ehrhardt, Larry Garvin, Steve Gey, Adam Hirsch, Tahirih Lee, Jim Rossi, Mark Seidenfeld, and Nat Stern offered their usual and invaluable encouragement and comments.

1. The Screwtape Letters and Screwtape Proposes a Toast 9 (Macmillan Co. 1961) (1942).

2. Ethics 329 (Eberhard Bethge ed. & Neville Horton Smith trans., Macmillan Co. 1964) (1949).

3. Or maybe by devilish design. See *infra* Part II.C.1.

4. Bernard W. Anderson, Understanding the Old Testament at xx (3d ed. 1975).

commentary. The very different source and content of this particular text, however, call that otherwise wise advice radically into question. These questions will be the principal focus of my commentary.

Part I is the text of the mis-sent e-mail, printed in its entirety.<sup>5</sup> Part II is my brief commentary. At the risk of anticipating the latter, I should forewarn you that the views expressed in the former are not necessarily either mine or those of the *Fordham Law Review*. Whether the views are truly those of the e-mail's author is a question addressed in Part II.

(The remainder of this page intentionally left blank.—Eds.)

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5. Satan's original notes are marked with an asterisk. I have added the others, generously assisted by the editors of the *Fordham Law Review*; given Satan's notorious untrustworthiness, it seemed advisable to pin him down as often as possible. *But see infra* text at notes 160-63.

## I. THE TEXT

## MEMORANDUM

To: Lucifer Dunkelstern, Esquire  
Managing Partner, Washington Office  
Satan & Siblings  
Suite 13  
666 "J" Street  
Washington, D.C. 20013

From: I. Satan, Esquire  
Satan & Siblings  
Home Office  
Pandemonium Bldg.  
Lac du Feu Blvd.  
Hell 07734

Re: L'Affaire Lewinsky, Liars, and Lawyers

Date: February 14, 1999

My apologies for writing on such an inauspicious day, but yesterday I received your glowing report on the above-captioned matter, apparently dispatched just after you learned of the United States Senate's vote to acquit President Clinton. I am afraid that I cannot share your enthusiasm with the result. Quite the reverse.

To my absolute astonishment, you ended your uncharacteristically effusive e-mail with the conclusion that "we have won a great immoral victory, as great as if Nixon had been publicly exonerated for Watergate."<sup>6</sup> "Evil triumphs," you trumpet, "and the public is not merely indifferent, but positively supportive. Polls show public approval soaring for the President, rebounding for Ms. Lewinsky, and plummeting for Ken Starr, Linda Tripp, and even Paula Jones."

Please. It pains me to think that you take me for some neophyte news anchor, whom you can "spin-doctor" into believing virtually any interpretation of events, however patently absurd. But it pains me less to think that you take me for a fool, than to think that you have made a fool of yourself. Can you really have so fundamentally misunderstood both the public perception and the significance of the

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6. Memos from Dunkelstern to Satan are, unfortunately, on file with neither the *Fordham Law Review* nor Professor Atkinson.

Lewinsky case? Make no mistake: This case has confirmed, maybe even strengthened, the basic moral wisdom and decency of the American people. They seem to appreciate, thanks in no small part to you, both the complexity and the tragedy of President Clinton's predicament with a depth of understanding that would have been unthinkable as recently as the Clarence Thomas confirmation hearings. To use an analogy that should take you back to our days together as first-year law students: you mistook dicta for holding and completely misconstrued the precedential importance of the case.

In the first place, you reminded people that sex can be funny. As one of our junior partners once wrote to an associate, in a letter that unfortunately fell into the wrong hands, "[t]he Joke Proper . . . turns on sudden perception of incongruity [and] . . . sex . . . gives rise to many incongruities . . ."<sup>7</sup> You confirmed that jokes about sex can be harmlessly enjoyed, and not just in single-sex contexts like locker rooms and hair salons. Men, with women, could laugh at the jokes about Bill, and conversely, women with men, in jokes about Monica. Their personal tragedy became public, almost Shakespearean, comedy. It transcended lines of not only sex, but also class, age, and even race. You should have known that your divide-and-conquer tactics were in trouble when Toni Morrison called for Americans to defend "our first Black President."<sup>8</sup> People found, to their evident delight, nothing distinctly misogynistic in laughing at Monica's Beverly Hills tackiness, nor anything distinctly anti-male in lampooning the President's larger-than-life libido.

At the same time, but in a more serious vein, the prurience of the press<sup>9</sup> necessitated a vast public dialogue about sex. What public school sex education had not overcome in two generations, you gave away in a single year—Americans' well-cultivated inability to talk about sex with their children and their parents.<sup>10</sup> What we had heretofore relegated to a mutually embarrassing, comically inadequate, one-time talk between a befuddled pre-teen and a bumbling parent, invariably of the same sex, you nearly turned into a regular dinner-time topic for the entire family, occasionally including Grandma and Grandpa!<sup>11</sup> When in the course of deliberate devilry

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7. Lewis, *supra* note 1, at 58.

8. Maureen Dowd, *It Was Ever Thus*, N.Y. Times, Oct. 18, 1998, § 4 (Week in Review), at WK15.

\*9. Thankfully, this is not a new phenomenon. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890) ("The press is overstepping in every direction the obvious bounds of propriety and of decency. . . . To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.").

\*10. Here I can cite no less an educator and scholar than Judge Posner: "A good effect that probably will be lasting is the encouragement of franker public discussion of sex." Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* 14 (1999). See also *id.* at 263 (reiterating the point).

11. See Stephen Sherrill, *Humor Thy Father*, New Yorker, Nov. 9, 1998, at 48, 48

has so much been lost to so many by so few—namely you?

Taking the aura of wickedness away from anything, except from something wicked, is hardly wicked. We gain from every increase in sexual immorality, as we gain in every increase in any immorality. But serious conversations about any immorality, sexual or otherwise, are hardly immoral. We lose when any topic is taken from the dark silence of taboo into enlightened dialogue. Have you forgotten? It is only our more benighted clients who dislike the *sex* in sex education; among our managing partners, it is the *education* that offends.

And there was worse. Not only did you make Americans laugh and talk wholesomely again, where laughter and talk had been banned almost wholesale; you also made them worry anew about two related matters that they dearly love and that we, accordingly, deeply loathe: limited public power and protected personal liberty. The way the Lewinsky affair became public—through a relentless, roving prosecutor—reminded Americans of their fundamental commitment to keeping public power out of private lives. They, as you should have known, famously prefer that ten guilty go free than that one innocent be convicted;<sup>12</sup> we, conversely, much prefer that one innocent cower in fear of accusation than that ten guilty escape prosecution altogether. As you should know well enough, we've never had much use for witches, much less for witchcraft. But witch hunts have always been thoroughly to our liking. Remember: "Men feared witches and burnt women"<sup>13</sup>—and other men too, in perhaps greater numbers, particularly in America.

But even alerting them to a threat to privacy was hardly the worst of it. In leading the President and his paramour into lies to protect their privacy, you reminded Americans that even their most treasured values do not exist absolutely and in isolation. With accidental irony, you helped them remember a paradoxical truth deeply embedded in their culture, but virtually forgotten by all except a few of their judges and criminal defense lawyers: The state's search for truth, even in courts of law, is not of the utmost importance; even the search for truth must sometimes give way to a still greater goal—the protection of individual rights and liberties.<sup>14</sup> And you led at least some of

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(imagining a humorous household conversation about the Clinton-Lewinsky affair).

12. See 4 William Blackstone, Commentaries \*358; see also *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (Marshall, J., concurring) (quoting William O. Douglas, *Foreword* to Jerome Frank & Barbara Frank, *Not Guilty* 11, 11 (Da Capo Press 1971) (1957) (stating same)).

13. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

14. See *United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part) ("[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission."). Just how that mission differs is, of course, subject to considerable dispute. See, e.g., Harry I. Subin, *The Criminal Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case*, 1 Geo. J. Legal Ethics 125, 129-31, 133-36, 148, 151 (1987) (discussing the legal dilemma of representing apparently untruthful clients).

them—we can only hope a small and isolated minority—to recognize what a dangerous handful of their saints and prophets had always known: Lying is sometimes defensible as the last defense against much greater evil, including the death of innocents and the destruction of privacy.<sup>15</sup> That damage may be very hard for us to control.

There, in briefest outline, is the damage you have done; if this is “a great immoral victory,” you should replace poor Pyrrhus of Epirus as an eponym. In the faint hope that your career in the firm can be saved—with diminishing confidence that it is worth my while to salvage—let me proceed.

(I must say, if only parenthetically, how deeply I now regret the degree of discretion that I committed to you in this matter while I more directly supervised less-seasoned subordinates in our new branch offices in Kosovo, Indonesia, and the Congo. My assessments of your relative merits were, alas, sadly misplaced, an error I shall, you can be sure, rectify immediately. To tell you the truth, I am very much tempted to look into some of the partnership “freeze-outs” that I have been reading about lately in the professional and academic literature.<sup>16</sup> But you and I go back a long way and, contrary to what those articles rather strongly suggest, I believe personal loyalty has to count for something in a profession like ours, if not in more mundane occupations.)

The remainder of this preface will re-introduce you to the basics of our firm’s function and structure. Against that background, section A will review the dubious aspects of the Lewinsky case, aspects that troubled me from the moment you mentioned the case in your “prospective business” memorandum. Section B will focus on the central problem, lying. Finally, section C will address a particularly tricky subset of lies, those that violate the law. I trust that I hardly need to suggest that you give the following reflections your utmost

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15. See Plato, *The Republic* § 382c-d, at 79 (Desmond Lee trans., Penguin Books 2d ed. 1987) (n.d.) (attributing to Socrates the position that lies can be useful against enemies and for averting evil). See generally John Henry Cardinal Newman, *Apologia pro Vita Sua* 327-55 (Harold Bloom ed., 1983) (1950) (summarizing this position as taken by, among others, Socrates and St. Clement of Alexandria); Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?*, in 16 *Tanner Lectures of Human Values* 307, 309-10 (Grethe B. Peterson ed., 1995) (same).

16. See generally Robert W. Hillman, *Law Firm Breakups: The Law and Ethics of Grabbing and Leaving* (1990) (detailing the phenomenon of law firm defections); Margaret Kline Kirkpatrick, Comment, *Partners Dumping Partners: Business Before Ethics in Bohatch v. Butler & Binion*, 83 *Minn. L. Rev.* 1767, 1779-84 (1999) (analyzing the circumstances in which a partnership may legally expel a partner under the Revised Uniform Partnership Act); Donald J. Weidner, *Cadwalader, RUPA and Fiduciary Duty*, 54 *Wash. & Lee L. Rev.* 877, 878-82 (1997) (describing the expulsion of 17 partners from a law firm and analyzing the subsequent lawsuit by the expelled partners).

attention.

With respect to the Firm, you, my dear Dunkelstern, have obviously lost sight of Satan & Siblings's illustrious foundation.<sup>17</sup> Our initial initiative, surely you remember, was to retire the founders of the old firm—with as much grace and dignity as the situation would allow<sup>18</sup>—and make me Managing Partner. With the principals of Vater, Sohn, & Geist out to pasture, we would have replaced their primordial principle of Rational Discourse with my own post-modern mantra, willful fiat. Out with *Fiat lux*; in with *Fiat flux*!

And that was just Phase One. Need I remind you of practice at the Old Firm: the interminable meetings, where every junior associate could question anyone, even Named Partners; Their absurd compensation scheme, "From each according to ability . . ."; the prelapsarian promotion plan, *carriere ouverte au talent*, with no distinction at all between us junior partners of the Angelic Order and those innumerable new associates from mere humankind; and "Knock, and it shall be opened unto you," the antediluvian "open door policy," partners' offices not excepted? Could you ever forget the countless *pro bono* hours, the endless jurisprudential nonsense—"the letter killeth, but the spirit giveth life,"<sup>19</sup> *et cetera, ad nauseum*?

Once we failed to oust the three old guys, we and the "associates and copartners of our loss"<sup>20</sup> had no choice but to go out on our own, with a completely new and different mission statement. What could have been more fitting than *anti bono publico*?<sup>21</sup> Under our original English Only rule, you will recall, that became Against Human Flourishing; now, in keeping with our new Y2K Positive Thinking Theme, "Harm Humanity."

Eventually—skipping forward a few eons—we needed branch offices. We opened simultaneously in Rome and Geneva, you

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\*17. Nor are you alone in this. See Kenneth W. Starr, *Truth and Truth-Telling*, 30 Tex. Tech. L. Rev. 901, 901 (1999) (finding novelty in Al Pacino's role in *Devil's Advocate*—"the attorney as, not to put too fine a point on it, Satan" (citation omitted)).

\*18. This is not, we both know, how all have seen it. See, e.g., John Milton, *Paradise Lost* bk. 1, ll. 38-44, at 9 (Scott Elledge ed., W.W. Norton & Co. 2d ed. 1993) (1674) (casting our struggle for independence in an unfavorable light).

19. 2 *Corinthians* 3:6 (King James).

20. Milton, *supra* note 18, bk. 1, l. 265, at 16.

\*21. As the grandiloquent Milton put it:  
To do aught good never will be our task  
But ever to do ill our sole delight,  
As being the contrary to his high will  
Whom we resist.

See *id.* bk. 1, ll. 159-62, at 13. Which is true enough, though his account, over all, puts us in a pretty bad light, "darkness visible," he dared to call it. *Id.* bk. 1, l. 63, at 10. But that beats the obscurity—no, better, confusion—into which he has fallen in these latter days. See *infra* text at notes 49-50. Suffice it here to say that, thanks to us, "Puritan poet" is now an oxymoron. And, in his own time, he learned a thing or two about darkness and visibility.



remember, when the seventeenth century's religious wars presented us with more business opportunities than Hell itself could accommodate. Then it was Paris and London, to counter the eighteenth century Enlightenment with *fin-de-siècle* social and economic upheaval. Finally, in this most sordid of centuries, we opened our offices in Washington and Moscow. We announced each opening with great fanfare as a giant step forward in servicing client needs; in fact, of course, we here at the home office needed a better means of selecting our clients and keeping them in line. Which brings me, at last, to your recent lapse.

A. *L'Affaire Lewinsky*

At some level, the blame for this debacle ultimately lies with me, as Managing Partner of the home office. I should not have let you talk me into thinking that this was a plausible test case of American morality. Based on your reports, both the plot and the characters seemed to have the makings of a fine travesty of justice: Deeply flawed figures—Clinton, Jordan, and Lewinsky—were to win at the expense of virtuous adversaries—Starr, Tripp, and Jones. The formers' malfeasance was to occur in the center of executive power, the Oval Office of the White House, and the latters' defeat was to be in the most highly visible of judicial and legislative fora, the federal courts and the United States Congress. To your minor credit, you did predict accurately the barest outline of the outcome: the questionable characters won by dubious means after protracted, sometimes internecine, conflict.

The plot, however, had twists that I assume you hardly anticipated. The most troubling questions of character dogged the very characters whom you chose to represent fidelity and fairness in your little immorality play. You failed to appreciate the subtleties of personality that dramatically affected people's perception of the outcome without actually altering the outcome itself. Subtleties of personality are the very sort of things that are difficult for me to gauge from afar, making me particularly reliant on fellows like you in the field—the whole point of our branch office system. That's why, if you'll pardon the platitude, my interest is always in the details. With both the virtuous and the vicious, you overlooked matters of character that affected the moral, if not the legal, outcome, and you forgot that the former is always our foremost concern. To make this point clear, I must review your casting decisions in uncomfortable particularity.

First, take your "heroes." Ken Starr, the chief among them, does have many admirable, even epic qualities, the very features that we would like to see frustrated and defeated.<sup>22</sup> He is bright, energetic,

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22. See Posner, *supra* note 10, at 65-66 (describing Starr's reputation for moderation at the time he was chosen as independent counsel).

and essentially self-made. What's more, he has elements of the genuinely chivalrous, even messianic, about him. He had, indeed, set aside the judicial robe and stepped down from one of the loftiest benches in the land to don the ordinary civilian garb of Solicitor General, and his motives in undertaking the quest in question do seem to have been truly patriotic. All of which, of course, should have made his undoing delicious.

But how could you have missed his other side, his invariable inclination to excess? Have you wholly forgotten our law school Aristotle? We learned to mind him especially, because his brand of virtue is the most focused on human flourishing, and hence the most inimical to us. Aristotelian virtue is very much a matter of balancing extremes, of exercising practical judgment with particular sensitivity to subtleties of context.<sup>23</sup> Your man Starr, by contrast, jerks to one pole with the mindless automaticity of a compass needle. This is particularly true of truth-telling, as we shall see in more detail below. Your Starr has done for perjury in this century what Hugo's Javert did for petty theft in the last.<sup>24</sup> By foolishly treating the law as an absolute, each made his contemporaries more aware of the moral complexities of human life. In addition, your actual case is an even more ironic reversal for us than Hugo's fiction: yours underscored the truth that untruths are sometimes morally permissible, even commendable. More about that in section B.

(I really wish I could put you on the next puddle-jumper from Dulles to the dullest city on the road-company circuit, with double-feature tickets for *Les Misérables* and *The Scarlet Pimpernel*. Your Starr's excessive prosecutorial zeal isn't just a ringer for Javert;<sup>25</sup> his personal clunkiness comically recaps Baroness Orczy's Chauvelin. By contrast, Clinton looks less the decadent despot and more—though admittedly not much—the dashing Pimpernel. But back-to-back Broadway musicals as punishment may be a bit harsh, even for you. Instead, bill your CLE budget for a paperback Portable Melville and curl up awhile with Captain Ahab<sup>26</sup> and “the starry Vere.”<sup>27</sup>)

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23. See Rob Atkinson, *Lawyering in Law's Republic*, 85 Va. L. Rev. 1505 (1999) (reviewing William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998) (noting increased reliance on Aristotle's method by theorists of legal ethics)).

\*24. I make no claim of originality in drawing the analogy; quite the reverse—it must have come up in every sixth-grade civics class in the country, to the tune of Stars. See Roger Allam, *Stars, on Les Misérables* (Relativity Records 1985) see also Maureen Dowd, *My Exit Strategy*, N.Y. Times, Nov. 22, 1998, § 4 (Week in Review), at WK17 [hereinafter Dowd, *My Exit Strategy*] (referring to Independent Counsel Javert).

\*25. Even Judge Posner, who generally defends Starr's investigation, see Posner, *supra* note 10, at 60-78, cannot but concede that “to conduct a sting operation against the President of the United States, in concert with the President's partisan enemies, is certainly questionable as a matter of sound enforcement policy.” *Id.* at 78.

26. See Maureen Dowd, *Truth or Dare*, N.Y. Times, Aug. 12, 1998, at A19 (comparing Starr to Captain Ahab).

The Cliffs Notes on your hero might well sum up his character like this:

He dons the halo of the fanatical devotee of truth who can make no allowance for human weaknesses.... He wounds shame, desecrates mystery, breaks confidence, betrays the community in which he lives, and laughs arrogantly at the devastation he has wrought and at the human weakness which "cannot bear the truth." He says truth is destructive and demands its victims, and he feels like a god above these feeble creatures and does not know that he is serving Satan.<sup>28</sup>

All this is entirely delicious. But it goes completely sour when everyone who is paying attention to the plot sees whose side our dupe is really on, and what his downfall means for us—not triumph, but humiliation. To make matters worse, along with Starr, the emblem of the narrow-mindedly virtuous, you exposed two other classes of our more eager, albeit usually unwitting, allies: the fanatically vengeful and the hopelessly hypocritical.

I will decline further comment on the latter class, whom you cast as an unholy host of otherwise eminently forgettable non-entities in both Houses of Congress,<sup>29</sup> except to say that they played their parts with perfect-pitch monotony. But your thoroughly mediocre pseudo-Medea warrants a further word. You described her—I have not deleted any of your earlier e-mails<sup>30</sup>—as "virtually a modern incarnation of both the classical Brutuses: Marcus Junius, willing to strike down even a friend who would become an emperor; and Lucius Iunius, ready to execute even sons who would restore a tyrant." Here, you said, was "a classical republican tribune of the plebs, a vigilant civil servant eager to cleanse the 'people's house' of the new Nero and his corrupt companions."

Fine words, but fine words burn no parsnips. Ms. Tripp was indulging a personal pique, not averting an abuse of power. At least that is how it looked to me, and I gather to most Americans—though apparently not to those in your "very favorably-impressed focus group."<sup>31</sup> The moral lesson is old and, I would have thought, obvious.

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27. Herman Melville, *Billy Budd*, in *Billy Budd and Other Tales* 7, 27 (Signet Classic 1961) (1924).

\*28. Bonhoeffer, *supra* note 2, at 328-29. Judge Posner, perhaps rightly (not that it matters much to us), defends Starr against widespread journalistic charges of sexual obsession. See Posner, *supra* note 10, at 69. But even Posner has to admit that "there is something a little crazy about turning the White House upside down in order to pin down the details of Clinton's extramarital sexual activities so that Paula Jones might have a shot at winning her long-shot suit for redress for an offensive but essentially harmless advance made (maybe) by Clinton before he became President." *Id.* at 91.

29. See Maureen Dowd, *The Apostle of Hype*, N.Y. Times, Jan. 27, 1999, at A25 ("Still, Bill Clinton's moral and ethical sloppiness is less heinous than the unforgiving and hypocritical behavior of Henry Hyde, Bob Barr, and their lynch mob.").

30. Not, alas, on file with author.

31. Cf. Posner, *supra* note 10, at 62 ("I leave the reader to decide, on the basis of

It is one thing to betray a friend who cannot be persuaded to respect the Constitution and who insists on subverting the political basis of friendship in a limited, republican government.<sup>32</sup> It is quite another to betray a friend to avenge yourself on a common boss whose principal offense seems to have been letting co-workers dress with less formality than you yourself affect. It is an open question whether Americans would choose, with England's clubby Forster, their friends over their country in a crisis.<sup>33</sup> But Ms. Tripp faced no such dilemma. Instead, from where I sit, it seems clear that she chose to prepare her petty attack by cultivating a pseudo-friendship with a quasi-foster child.<sup>34</sup> In short, you promised the Brutuses Lucius and Marcus, but provided Judas Iscariot. For the noblest of the Roman republicans, you substituted the nastiest of the office politicians. In the Pulitzer-winning words of Maureen Dowd: "This one is indefensible."<sup>35</sup> "Americans are never going to forgive her illicitly taping a friend."<sup>36</sup> Americans may not know their Dante, but they know, perhaps better than he, who belongs in our Ninth Circle.<sup>37</sup>

Even your "violated victim" proved to be a profound disappointment. Paula Jones was, to be sure, a plausible victim of sexual harassment, which has been all the rage since the Clarence Thomas hearings.<sup>38</sup> Her just plain "Jones" had an "every-woman" quality that nicely reflected the increasingly commonplace claim of sexual harassment, even as it echoed an epic "I've not yet begun to fight" feistiness.<sup>39</sup> Her defeat—or better yet, humiliation—would have nicely discouraged, if not discredited, thousands of women who have legitimate claims. It might have made for a delightful double-

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the circumstances surrounding her decision to tape . . . whether she had adequate justification for this prima facie breach of moral duty.").

\*32. That, I take it, was Brutus's take on Julius Caesar. See William Shakespeare, *Julius Caesar* act 2, sc. 1, in *The Riverside Shakespeare* 1151, 1157-58 (2d ed. 1997) (1599). But that has not, fortunately for us, been everyone's take on Brutus. See *infra* note 37 (discussing Dante's dubious view of the matter).

33. See E.M. Forster, *What I Believe* 8 (1939).

34. See Posner, *supra* note 10, at 61-62 ("She repeatedly assured Lewinsky, in the very phone conversations she was taping, that she was Lewinsky's good friend, that her feelings toward Lewinsky were almost maternal, and that Lewinsky should trust her.").

35. Dowd, *My Exit Strategy*, *supra* note 24.

36. Maureen Dowd, *There's Something About Bill*, N.Y. Times, Aug. 2, 1998, § 4 (Week in Review), at WK15.

\*37. Dante's placement of Caesar's nemesis down here with us was one of our greatest propaganda coups. See Dante Alighieri, *The Divine Comedy: Inferno* canto 34, ll. 64-66, at 291 (John Ciardi trans., Modern Library 1996) (1314). It took no less a humanist than Shakespeare to set the record straight. See Shakespeare, *supra* note 32, act 5, sc. 5, at 1178 (Antony eulogizing Brutus as "the noblest Roman of them all").

\*38. During which, incidentally, you and your colleagues in both camps did acquit yourselves wonderfully well—well enough to raise unfounded hopes for your success in the present matter, I have to add.

\*39. I assume you appreciated the fortuitous allusion to John Paul Jones; then again, you are a bit rusty on your republican heroes.

bind: Either speak up and risk being branded a whiner, or sit silent and let yourself be made a passive victim.

In Ms. Jones's case, it was less that her personal failings undid her and discredited us, and more that her entirely ordinary personality put off her promoters, an unholy alliance that would usually be much to my liking. As you somewhat simplistically put it, "Sexual harassment is hated by the extreme Right because it involves acts of *sex* unauthorized by the state and by the extreme Left because it involves acts of *power* unauthorized by the state." I suspect that Ms. Jones alienated the Right by making herself more beautiful than she "naturally" was. I'm sure she put off both the Right and the Left by sacrificing the potential vindication of their abstract principles to settle for a mundanely monetary remedy for her personal injury. No doubt, all of that made her purported helpers look pretty shabby. But what do we gain by having extremists exposed in their extremisms, and extremisms publicly identified with their extreme human costs?<sup>40</sup>

In that respect, nowhere was your casting worse than with "her knights of the Round Table, the Rutherford Society." As if I needed to be reminded, you pointed out that "they are the namesakes of Samuel Rutherford, the author of *Lex Rex*, a classic treatise on the 'government of law, not of men,' and a vigorous Parliamentary opponent of Stuart despotism and 'the divine right of kings.'"<sup>41</sup> "Their going down to defeat in the Jones-Lewinsky affair," you argued, would "symbolically settle an old score, one of the first—though thankfully brief—triumphs of deliberative government over divine-right personal prerogative."

You couldn't have been more wrong. Your quixotic antiquarianism exposed some promising *agents provocateur* and threatened to upset one of our greatest propaganda coups. As it turned out, the Rutherford Society, like many public interest groups, is hardly as selflessly heroic as you suggested. Their various rifts with Ms. Jones<sup>42</sup> revealed a deep tension that has often redounded to our benefit: the temptation of "public interest law firms" to place their abstract, long-term goals above an individual client's concrete, short-term needs.<sup>43</sup>

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\*40. As one of our more astute junior partners once opined, "[a]ll extremes, except extreme devotion to the Enemy, are to be encouraged." Lewis, *supra* note 1, at 40. Too bad we lost him in a post-security-breach purge.

41. See generally J. Scott Orr, *Conservative Nonprofit Gains Fame Backing Suit*, Atl.-J. Const., Feb. 15, 1998, at B7 (providing a brief background on the Rutherford Institute).

42. See Neil A. Lewis, *Legal Team's Withdrawal Crucial in Jones's Decision to Settle*, N.Y. Times, Nov. 15, 1998, at A34; Neil A. Lewis, *Money Effort in Jones Suit Falls Apart*, N.Y. Times, Oct. 16, 1998, at A18; Neil A. Lewis, *Paula Jones Lawyers Are Said to Be Annoyed, and Quitting*, N.Y. Times, Nov. 5, 1998, at A24.

43. See *In re Primus*, 436 U.S. 412, 440 (1978) (Rehnquist, J., dissenting); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 471 (1976); see also David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership*

Remember their implicit mottoes: Abstract over Concrete; Principles over People. Nor, as their client's case progressed, did their principles seem quite so lofty as you suggested. Pretty early on it became clear that they were not toppling a despot to avert a Constitutional crisis, but engineering a Constitutional crisis to unseat a popularly elected President. I knew Charles I; Charles I was a friend of mine. And Bill Clinton is no Charles I.

Even if the Rutherford Society had really been about the old Puritan business of preserving limited government, their defeat would hardly have been for us the propaganda coup that you asserted. In the affairs of humans, good succumbing to evil is a pretty common occurrence, as surely even you must have noticed, and the history of honorable defeat in the Good Old Cause, as they call it, inspires as many of our enemies as it discourages.<sup>44</sup> In any case, Lost Causes are hardly the sort of thing that we fallen angels can conscientiously discountenance.

What most advances our cause—and, conversely, most demoralizes the opposition—is making virtue look vicious and vice, virtuous. We had long ago achieved just that with one of our greatest reversals, the Puritan Revolution. Only academics read *Areopagitica* anymore.<sup>45</sup> Americans remember the party of Milton, with the most diabolical irony, as the opponents of both freedom of speech and liberty of conscience.<sup>46</sup> “Puritanism” is their synonym for the most distasteful sort of sanctimonious old-maidism,<sup>47</sup> and they associate Cromwell the

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Conference 52 (1986) (examining the NAACP's refusal to assist in appealing Rosa Parks's conviction, part of Dr. King's Montgomery bus boycott, because it did not seek the complete abolition of segregation on city buses); Oliver A. Houck, *With Charity for All*, 93 Yale L.J. 1415, 1515 (1984) (questioning charitable status of neo-conservative public interest law firms).

\*44. Admittedly, their psychological devastation in the immediate aftermath of defeat was truly delightful. See generally, e.g., Christopher Hill, *The Experience of Defeat: Milton and Some Contemporaries* (1984) (describing deep and widespread disappointment of the Puritan Party at the restoration of the Stuart monarchy in 1660).

\*45. Some of these academic readers do come dangerously close to the truth. See, e.g., Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment* (visited Oct. 23, 1999) <<http://www.yale.edu/lawweb/lawschool/occpaper/blasi.htm>> (describing *Areopagitica* as the “foundational essay of the free speech tradition”); see also, e.g., Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. Rev. 1567, 1569 (1999) (tracing certain justifications of free speech to *Areopagitica*). But, fortunately for us, only academics read academics.

\*46. Here, Arthur Miller's *The Crucible* was a great help. Americans can neither forget his equation of Puritan witch hunters with Macarthyism nor remember that his heroes were Puritans too. In this respect, Americans are hardly the most blameworthy. See 1 Thomas Carlyle, *Oliver Cromwell's Letters and Speeches: With Elucidations* 5 (3d ed. 1857) (“Given a divine Heroism, to smother it well in human Dulness [sic], to touch it with the mace of Death, so that no human soul shall henceforth recognise it for a Heroism, but all souls shall fly from it as from a chaotic Torpor, an Insanity and Horror,—I will back our English genius against the world in such a problem!”).

\*47. See Webster's Third New Int'l Dictionary of the English Language

Protector with proto-fascism, when they remember him at all.<sup>48</sup> Few enough of the current generation of Americans know even their own Patrick Henry; it hardly behooves us to risk reminding them that this forest-born Demosthenes took as his rhetorical role model none other than Cromwell himself.<sup>49</sup> Remember, in our business, discrediting our enemies—or even better, consigning them to oblivion—matters more than defeating them. That is now, happily, the home of both Oliver and the “Good Old Cause,” and has been for almost a dozen human generations.<sup>50</sup> *Sic semper tyrannicidus*; let sleeping liberators lie.

If your hand-picked heroes failed to arouse the sympathy you promised, those whom you cast as villains more than made up for it. It pains me to re-read your description of Monica Lewinsky as “mall rat, spoiled broken-home brat turned spoiling home-wrecker, Generation-Xer without either the workaday diligence of America’s Depression-era grandparents or the John Lennon idealism of their sixties children.” There was obviously more there, and you obviously shouldn’t have missed it.

By the end of her ordeal, even her most ardent detractors had to admit that the Monica who melted down at the mall interrogation had become a young lady more than able to match her antagonists.<sup>51</sup> Her

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Unabridged 1846 (Philip Babcock Gove ed., 1993) (defining puritan as “one who on religious or ethical grounds inveighs against current practices, pleasures, or indulgences which he regards as lax, impure, or corrupting”). Judge Posner, I am happy to report, has helped perpetuate this perspective. See Posner, *supra* note 10, at 14 (“The residuum of sexual puritanism in the United States is dysfunctional . . .”); *id.* at 69 (“There is no basis for the claim by Clinton’s defenders . . . that the vigor with which Starr pursued the investigation into the affair was a consequence of his being a sex-obsessed puritan witch hunter, or a puritan of any kind . . .”); *id.* (“[I]t is a bit much to argue that anyone who disapproves of extramarital sex must be a puritan . . .”). This is also in accord with the English view. See Lewis, *supra* note 1, at 43 (“[A]nd may I remark in passing that the value we have given that word [Puritanism] is one of the really solid triumphs of the last hundred years? By it we have rescued annually thousands of humans from temperance, chastity, and sobriety of life.”).

48. See Maureen Dowd, *Center Holding*, N.Y. Times, May 20, 1998, at A23 (recalling her mother’s story of how Cromwell’s soldiers threw “babies up in the air and impale[d] them on their swords as they came down”).

\*49. In his formerly famous speech in Virginia’s House of Burgesses, you will recall, he said, “Caesar had his Brutus; Charles the First his Cromwell; and George the Third . . . may profit from their example.” Moses Coit Tyler, Patrick Henry 64-65 (1888); see also 15 The New Encyclopedia Britannica Micropaedia 854, 854-55 (15th ed. 1994) (providing brief biography of Henry).

\*50. See 1 Carlyle, *supra* note 46, at 7 (“The Age of the Puritans is not extinct only and gone away from us, but it is as if fallen beyond the capabilities of Memory herself, it is grown unintelligible, what we may call incredible.”).

51. Compare Maureen Dowd, *Feathered and Tarred*, N.Y. Times, June 10, 1998, at A29 (“You can take the girl out of Beverly Hills, but you can’t take Beverly Hills out of the girl.”), and Maureen Dowd, *The Pink-Poodle Blues*, N.Y. Times, Nov. 15, 1998, § 4 (Week in Review) at WK15 (“Monica must be in a panic to squeeze the last drop of profit from this sordid tale.”), with Maureen Dowd, *Monica’s ‘Truman Show’*, N.Y. Times, Feb. 7, 1999, § 4 (Week in Review), at WK 17 (announcing that “[o]ur little girl has grown up” and describing her as a survivor who “come[s] out tougher and savvier,” and who “was up to the crucial task of putting the clueless House managers

being "spoiled" took on both a new sense and a different tense. She seemed less morally rotten in the ways of Washington at the end of her story than badly reared in the ways of Beverly Hills at the beginning. If forbidding her to phone her mother from the mall undid her when the trap was sprung, she made up for it by protecting her mother when the screws began to tighten. And even that had an ironic and redeeming twist: the thong-thumping gold-digger, once all too ready to blackmail her presidential paramour for a more glamorous post, proved a doggedly loyal former lover and fellow sinner. True, your boys eventually reduced her to betrayal. But it was truthful, not treacherous, and it was only with palpable reluctance and perhaps only to ransom her hostage mother. On the matter of betrayal, no one comparing her with her self-appointed mentor and surrogate mother, Linda Tripp, could much doubt who was more the sinner and who more the sinned against, if hardly the saint.

Being sinned against, Ms. Lewinsky came to enjoy a certain sympathy, if not quite moral authority. Thus, more than anything else, it was her firmly fixed hatred—righteous indignation, really—that ultimately condemned not only Tripp, but also Starr. And if her continued affection could not quite redeem her lover, at least it reminded most people that he was dangerously lovable—and that those who fell for him were at worst foolish, and thus at least forgivable. Indeed, what people found most unforgivable on his part may have been less his finger-wagging public denial than his cold reference to his paramour as "that woman"—not to mention what seems to have been at least connivance in her vilification by his supporters and proxies.<sup>52</sup>

And what, finally, of President William Jefferson Clinton? In some respects, you couldn't have chosen a more tarnished sublunary figure to eclipse Starr's apparently stellar virtues. Clinton could hardly have survived the Gennifer Flowers flap, the draft-dodge dodge, and the "I didn't inhale" choke without becoming "Slick Willie" in the mind of anyone with a mind. But Slick Willie was no Tricky Dick, and their differences are instructive. Nixon was notoriously vindictive, and Clinton was not, whatever you believe about his private tantrums.<sup>53</sup>

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in their place"). Judge Posner, no fan of Dowd, *see* Posner, *supra* note 10, at 69, comes to much the same conclusion: "The picture that emerges from this huge record is of a woman who is intelligent, who has a retentive memory, and who has very little 'woman-scorned' hostility toward the President." *Id.* at 32 (footnotes omitted). Judge Posner also refers to "the metamorphosis of Monica Lewinsky from the giddy pizza-bearing sextern of November 1995 to the poised and articulate young woman" of 1999. *Id.* at 262 n.2.

52. *See* Posner, *supra* note 10, at 27 ("It is plausible, though not proven, that [Presidential Assistant Sidney] Blumenthal . . . fed the media stories that Lewinsky was a stalker, deranged, 'not playing with a full deck,' and, in short, unworthy of belief."); *see also id.* at 141 ("He [Clinton] slandered Monica Lewinsky, calling her a liar and a stalker.").

53. *See* George Stephanopoulos, All too Human: A Political Education 96-98,



Although Whitewater was morally treacherous and politically polluted, it was no Watergate. Nixon was stopped from indulging a nearly Stalinesque paranoia; Clinton seemed to be suffering the kind of hounding that most citizens secretly fear from the Internal Revenue Service on their individual tax returns. Clinton, at worst, is probably not even much of a liar; Nixon was much worse.<sup>54</sup> And Ken Starr, despite his aforementioned virtues, was no Archibald Cox.

Whitewater may, at bottom, have been the Marxian redux of Watergate's tragedy.<sup>55</sup> But I doubt it. The impeachment matters were more a pathetically May-December *Romeo and Juliet* than a farcical *Macbeth*, or *Antony and Cleopatra*. Ms. Lewinsky had too little of Lady Macbeth, much less the Queen of the Nile, even for caricature, and the First Lady, however well she might have parodied the former, was far too often offstage in the Ken Starr production. To the Left—even the feminist Left—Clinton looked more like a person being persecuted for private indiscretions than a predatory pervert caught with his pants down.<sup>56</sup> To the Right—all except the very Far Right<sup>57</sup>—he looked more like an ordinary fellow brought low by a guileful woman, or by a government agent run amuck, or both, than either a moral pariah or a legally impeachable scofflaw.<sup>58</sup> Most importantly, to most Americans, mostly people of the middle, his persecutors came to look mean, in both meanings of the word—low and malicious.

The only high drama that Clinton's impeachment ordeal really resembles is Clarence Thomas's Senate confirmation hearings. There, at the beginning of the decade, in a chamber of the very same Senate, is the tragedy that truly prefigures this farce at the end. There, two deeply decent, if somewhat dim, people were caught up in the

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176, 286-88 (1999) (detailing the President's frequent tirades and tantrums).

\*54. I am pleased to report that not everyone agrees. See, e.g., Alan M. Dershowitz, *How Clinton Is Worse than Nixon, in Sexual McCarthyism: Clinton, Starr, and the Emerging Constitutional Crisis* 149, 149-61 (1998) (unfavorably comparing Clinton's civil liberties record to Nixon's). Even more delightfully, Professor Dershowitz purports in these very pages to count himself among "Clinton's most ardent political supporters and friends." *Id.* at 153. Just when you thought "Friend of Bill" had already been reduced to absurdity . . .

55. Cf. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* 15 (Int'l Publishers 1963) (1852) (using Marx's theory of historic materialism to analyze the events of the revolution of 1848).

56. See Richard L. Berke, *Willey Interview Shakes Clinton's Support Among Women*, N.Y. Times, Mar. 17, 1998, at A21. Feminists like Patricia Ireland, the president of the National Organization for Women, describe how feminists perceive Clinton as a "likeable rogue and womanizer" not as a perpetrator of "sexual assault [or] sexual abuse" *Id.*

57. See Posner, *supra* note 10, at 62 ("The true 'Clinton-haters' are only the fringe of the considerable opposition to him . . . . The fringe has beliefs best described as paranoid fantasies . . .").

58. See *id.* at 75 (stating that when watching the President's grand jury testimony on television, "the dominant sense was of a person in an impossible position doing his plucky best to elude his tormentors").

machinations of the mean-spirited. What might have been a national dialogue on harassment, with real relief for its victims, degenerated into a decade-long harangue and witch-hunt,<sup>59</sup> during which a host of promising public careers were wrecked on account of purely personal improprieties.<sup>60</sup>

We have good reason to fear that the Clinton affair ended these *autos da fé* in a Halloween carnival, with most of the great bug-bears unmasked. The setting being America, we were at least spared the spectacle of a Mitterrand funeral—widow and mistress together mourning a socialist president before a great and gracious liberal nation.<sup>61</sup> But even America may have learned a dangerous lesson: private sexual misconduct, even if brought luridly to public light, is no disqualification for distinguished public service.

Let me anticipate two objections. First, that this is all a bit too law-and-literary for hard-headed lawyers like us. Well, *tu quoque*—don't forget how "delightfully Dickensian" you thought it would be to have "a star named 'Starr,'" "what a triple trip to have a villain tripped up by 'Tripp.'" My literary analysis, at least, aspires a bit higher than the level of puns.

\*59. In America, you would do well to remember, witch hunts almost always have to do with sex. See Christopher Bigsby, *Introduction* to Arthur Miller, *The Crucible: A Play in Four Acts* at xiv (Penguin Books 1995); see also Arthur Miller, *The Crucible: A Play in Four Acts* 33 (Penguin Books 1995) (1953) ("Sex, sin and the Devil were early linked, and so they continued to be in Salem, and are today.").

60. See Anita L. Allen, *Lying to Protect Privacy*, 44 Vill. L. Rev. 161, 164 & n.8 (1999) (recalling the fallout after Gary Hart's "Monkey Business"); Martha Chamallas, *The New Gender Gap: Reflections on Sex Scandals and the Military*, 83 Minn. L. Rev. 305, 317-19 (reviewing recent sex-scandals in the military that cut short the careers of various service-members); Richard L. Berke & Lizette Alvarez, *Professions of Shock and Support Aside, Livingston May Have Been in for a Push*, N.Y. Times, Dec. 20, 1998, § 1, at 33 (reporting resignation of House of Representatives Speaker-elect Livingston after revelation that he had an extramarital affair); Thomas R. Ricks, *Ralston Withdraws from Consideration for Joint Chiefs of Staff Chairmanship*, Wall St. J., June 10, 1997, at A4 (reporting withdrawal of General Ralston's candidacy for Chairman of the Joint Chiefs of Staff after revelation that he had an extramarital affair); Elaine Sciolino, *Air Force Lieutenant Given Discharge for Fraternization*, N.Y. Times, July 12, 1997, at A6 (reporting that Air Force Second Lieutenant William R. Kite, Jr., would be given a general discharge as punishment for becoming romantically involved with an airman whom he later married and for lying to conceal the relationship, and also reporting that Kelly Flinn, an Air Force First Lieutenant charged with adultery, was given a general discharge as part of a plea bargain); Elaine Sciolino, *Pilot Facing Adultery Charge Agrees to a General Discharge*, N.Y. Times, May 23, 1997, at A1 (reporting that Air Force First Lieutenant Kelly Flinn, the first female B-52 pilot, would be court-martialled for adultery).

61. See Craig B. Whitney, *Extended Family in Mourning*, N.Y. Times, Jan. 14, 1996, § 4 (Week in Review), at WK2; see also Thomas Nagel, *Concealment and Exposure*, 27 Phil. & Pub. Aff. 3, 9 n.4 (1998) ("In France, a postadolescent civilization, it is simply taken for granted that sex, while important, is essentially a private matter"); Howard Kleinberg, *Mitterrand Proves the French Are Different from Us*, Denver Post, Jan. 21, 1996, at E6 (comparing cultural differences between the United States and France with respect to paramours).

My focus in this section, as I stated at the outset, is character. I would have thought it enough that that was the focus of the arch-humanist Aristotle.<sup>62</sup> But, for your comfort, let me point out that character is also the emphasis of no less hard-headed, even litigation-oriented, an authority than Dean Wigmore. In addition to being one of the century's great evidence scholars, he was also, as you should know, a pioneer in the law and literature field. Writing in 1908, hardly the hey-day of post-modernism, in the *Illinois Law Review*, no fashionable Ivy League *feldschrift*, Wigmore had this to say to practicing lawyers on the subject of literature:

And so the lawyer, whose highest problems call for a perfect understanding of human character and a skillful use of this knowledge, must ever expect to seek in fiction as in an encyclopedia, that learning which he cannot hope to compass in his own limited experience of the humans whom chance enables him to observe at close range.<sup>63</sup>

Your second likely objection will serve as the transition to my next section. At bottom, I suspect you rightly suspect, both Clinton and Nixon lied, maybe as early and as often as LBJ's constituents voted. If anything, Clinton lied more obviously, shaking his finger at the entire nation, denying his lover with as much persistence as the panicked Peter denied his Lord. Why, then, did the nation turn from its initial moral outrage to broad, and perhaps deep, support? What's more, why was that turn to the liar and his lie not, as you assert, a great immoral victory for us? To answer those questions, we must delve into the very nature of lying itself.<sup>64</sup>

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62. See generally Aristotle, *Nicomachean Ethics* 37 (E.V. Rieu ed. & J.A.K. Thomson trans., Penguin Books 1955) (n.d.) (basing his ethical system on an analysis of human nature).

63. John H. Wigmore, *A List of One-Hundred Legal Novels*, 17 Ill. L. Rev. 26, 32 (1922) (reprinting and correcting the original essay that was published in 2 Ill. L. Rev. 574 (1908)).

\*64. You will find intoxicating comfort in the leading modern treatment of the subject, see generally Sissela Bok, *Lying: Moral Choice in Public and Private Life* (1978), which takes very nearly your line on the almost invariable evil of lying. But I recommend you sober up with these two sentences from William H. Simon's critique of Bok's book:

She never succeeds in finding a resting place between the uninteresting claim that one shouldn't lie without a moral reason and the untenable claim that, when one has such a reason, it is presumptively trumped by a duty of honesty. The book's undeniable achievement is thus, not to stake out a position or sustain an argument, but to generate, through rhetoric, reference, and example, a sense of anxiety about lying.

William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 Geo. J. Legal Ethics 433, 437 (1999). Fortunately for us, Professor Simon directs admittedly little attention to the Lewinsky affair. See *id.* at 458-61. For a recent, more detailed analysis of my view, see David Nyberg, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life* (1993), which defends lying and other forms of deception as essential for human flourishing.

B. *Lying*

Here, in your own words, is what you took to be the essential evil of your "achievement": "not just to keep a liar in the highest office in the free world, nor even to make his truthful nemesis look foolish in failure, but, far more significantly, to lead the American people to embrace both the lie and the liar." You also boasted that you implicated a major lawyer—the brother of a crusader for moral revival—in an unforgivable lie.<sup>65</sup> Not much could be further from the truth; in fact, you have gotten very nearly everything wrong.

You have made truth-absolutism look bad—which it is—and thus have hurt our cause in the world. The greatest virtue, like the greatest vice, is subtle and discerning. This is a hard lesson that is fortunately lost on most lovers of virtue. You, unfortunately, have driven this lesson home to all but the most thoroughly benighted. Lovers of vice must both know better in theory and do better in practice. Pay close attention.

Of course lying is an important means of undermining human flourishing—arguably the most powerful means at our disposal. In recognition of that discovery, I am rightly called the Father of Lies,<sup>66</sup> though I well remember your argument that "Elder Brother" would have been "more fair." But it is fundamentally important not to confuse ends and means—as, alas, you have done. Let me explain.

Take, for example, my first and most radically successful lie. As the story goes, I told the original humans that something bad for them, the so-called "forbidden fruit," was really good for them.<sup>67</sup> I persuaded them to believe me over and against their Friends, the source of all the goodness that they had theretofore known. With delicious irony, I convinced them that their Friends had lied and had forbidden them to partake of something good for them on the pretext that it was bad. But the real beauty of the thing—and the critical twist that made it work in the first place—was a deeper and more damaging

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\*65. Judge Posner lays essentially all the blame on the President for the misconduct in question—letting his lawyer, Robert Bennett, rely on the false Lewinsky affidavit. See Posner, *supra* note 10, at 56-57. For your amusement, if not edification, you might also want to re-read (brother) William J. Bennett, *The Death of Outrage: Bill Clinton and the Assault on American Ideals* (1998), or for some still lighter fare, see *The Book of Virtues for Young People: A Treasury of Great Moral Stories* (William J. Bennett ed., 1993) and *The Moral Compass: Stories for a Life's Journey* (William J. Bennett ed., 1995). See Kenneth Anderson, *The American Inquisition: How the Religious Right and the Secular Left Collude in the Growth of the Prosecutorial State*, *Times Literary Supp.*, Jan. 29, 1999, at 12, 12 ("Reinvented as America's very own Liberator of virtue, purveyor of Virtue Lite, he has made a tidy fortune selling a series of books on morality.").

\*66. As the Second Partner in the Old Firm is reputed to have said to some of our associates, "Ye are of *your* father, the devil, and the lusts of your father ye will do. . . . When he speaketh a lie, he speaketh of his own: for he is a liar, and the father of it." *John* 8:44 (King James). Sometimes I think they are just trying to flatter me.

67. See *Genesis* 3:4 (King James).

deception. I successfully implied to them that their Friends' mode of operation was arbitrary fiat, "Do this; don't do that"—period, no questions.

I knew that to oppose arbitrary fiat was very much in their "human" nature—as it was in the nature of Them whom we perpetually oppose, and in Whose image they were initially created. Just like Them, they love dialogue and hate dictate. And so great was their outrage at the prospect of being arbitrarily ordered around by anyone, including Them, that they made the proto-typical error of their kind: they violated their Friends' strongly expressed wishes without asking Them for a reasoned explanation. Given what we know of Them, They doubtlessly would have been more than happy to explain. Remember Their damned Open Door Policy? But they never asked Them; instead, they ate the fruit on my malicious recommendation. Thus I used a subordinate good in their nature—visceral opposition to arbitrary fiat—against the supreme good of that nature—reasoning with their Friends through dialogue.<sup>68</sup> Paradise—lost! The rest of the story—of history, really—I hope I can safely presume you remember.

What made this greatest of evils possible was my lie (not to mention my fiendish cleverness). But notice something absolutely critical about that lie: it was not merely a statement contrary to a strictly truthful account; much more significantly, it was an untrue statement *successfully calculated to disrupt human flourishing*. In the case of Adam and Eve, I disrupted human flourishing of the most basic kind, trusting and open dialogue between friend and Friend.

To fully appreciate why disrupting human flourishing lies near the heart of lying, consider another account that departs from the strictly literal "truth": the story I just told you about humanity's Fall. I scarcely need to remind you that it is not literally "true," though it is anything but a lie.<sup>69</sup> Confusion on this point is one of our very greatest achievements. Just with respect to Biblical stories of human beginnings, this confusion has marvelously disrupted dialogue among people devoted to human flourishing.<sup>70</sup> Let's not be hoist with our

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\*68. The opposite use of lying—to preserve, rather than disrupt, just this sort of dialogue as the supreme good of both Judeo-Christian and Greco-Roman ethics—has been ably, which is to say, dangerously, defended by MacIntyre, *supra* note 15, at 310-13. Particularly troubling to us is MacIntyre's careful navigation between our two chief allies here: the Scylla of truth-absolutism and the Charybdis of vague and overbroad bases for telling lies.

69. Cf. John A. Barnes, *A Pack of Lies: Towards a Sociology of Lying* 122-35 (1994) (exploring variations of truth and deceit in fictional works).

\*70. What a trouncing Darwin's friend Thomas Huxley, no slouch of a scientist and humanist himself, gave Bishop Wilberforce, the great abolitionist's own son! See Stephen Jay Gould, *Rocks of Ages: Science and Religion in the Fullness of Life* 123 (1999). And what a delight it was to see Clarence Darrow, lawyer for the down-and-out, humiliate old William Jennings Bryan, who had so rousing denounced the Eastern Establishment's crucifixion of humanity upon its "Cross of Gold"! See Gould, *supra*, at 133-34. Even today, two camps of our declared foes, the secular humanists

own petard.

There is, however, an even more important confusion, which is one of my even greater achievements, and which lies very near the core of your bungled case, and the reason for your having bungled it. Contrary to a widely held belief among humans—actively and effectively promoted by yours truly, with the unwitting aid of an impressive cadre of bright and good-willed people<sup>71</sup>—all statements made contrary to fact, with an intent to deceive as to literal fact, are not “wrong” in the only sense meaningful to us: damaging to human flourishing. Some, of course, are; chief among them is my master-lie, already recounted, which resulted in humanity’s fall from gracious communion, friends with Friends. But many, we must bear in mind, are not; indeed, without some untruths, human flourishing in the fallen world that we devils have brought about would be virtually impossible. Let me explain.

First, I assume you know that knowledge is power, or at least an important source of power. And power, like most other means and capacities, can be used for good or evil ends—in our terms, to promote human flourishing or to undermine it. If powerful people are bad—if they use their power to assert their arbitrary wills at the expense of mutually respectful dialogue—the promotion of human flourishing will depend on keeping important knowledge away from them.<sup>72</sup> Sometimes the only means of accomplishing this is intentional deception. In those circumstances, lying works not for us, but against us, sometimes devastatingly so.

Let me give you an illustration that is well-documented in the annals of our opponents.<sup>73</sup> The Egyptian Pharaoh once took it upon

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and the religious fundamentalists, are wonderfully wasting each others’ resources. See *Edwards v. Aguillard*, 482 U.S. 578, 592-94 (1987) (rejecting claim of “scientific creationists” that “secular humanism” is not a religion for establishment clause purposes). For a history of this wonderful war of attrition and a scarily simple proposal for peaceful co-existence, see generally Gould, *supra*.

\*71. Chief among them—or at least among those who have done us the service of committing their errors to paper—are Augustine of Hippo and Kant of Königsburg. See Augustine, *The Soliloquies*, in *The Library of Christian Classics*, Augustine: Earlier Writings 23, 42-63 (John H.S. Burleigh ed. & trans., 1953) (386); Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, in *The Critique of Practical Reason and Other Writings in Moral Philosophy* 346-50 (Lewis White Beck ed. & trans., Univ. of Chicago Press 1949) (1797); Immanuel Kant, *The Metaphysics of Morals* 225-26 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797); see also Barnes, *supra* note 69, at 79 (noting preeminence of Augustine and Kant in the western Christian opposition to lying).

\*72. See Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 *Notre Dame L. Rev.* 722, 748 (1989) (“The fact that deception shifts power does not mean that deception shifts power unjustly. It is only when deception shifts power unjustly that deception is unethical.”). Out of the mouths, not just of babes, but also of law students!

\*73. See *Exodus* 2:8-22 (King James). Coming, as it does, in their Holy Writ, this account of virtuous lying has generated a huge volume of commentary, particularly

himself to enslave the descendants of Jacob, also known as Israel, and to eliminate them as a distinct culture through universal male infanticide. As a means to that diabolical end, the Pharaoh ordered the Hebrew midwives to summarily execute every male Hebrew child at his birth. When the population of Hebrew males showed no sign of falling, the Pharaoh called the midwives to account.

Caught between yours truly and the deep blue sea<sup>74</sup>—the dilemma of either confessing their violation of the Pharaoh's edict or lying about it—the midwives chose the latter. The midwives falsely reported that the Hebrew women gave birth so easily that their babies were delivered before the midwives could arrive to help—or work the Pharaoh's will. In Their official account, the midwives were blessed for the success of their deception.<sup>75</sup> Construing it as narrowly as you can, the holding in the midwives' case comes at least to this:

Uphold truthfulness in all your actions by being unqualifiedly truthful in all your relationships and by lying to aggressors only in order to protect those truthful relationships against aggressors, and even then only when lying is the least harm that can afford an effective defense against aggression.<sup>76</sup>

From our perspective, the point is this: Sometimes lies work not for us, but against us. Take comfort, if you like, in the fact that evil is thwarted in such cases, or good advanced, only by dubious means. From where I prefer to sit, which is in Hell, that is a pretty cold comfort indeed.

But, you will insist, the kind of literal untruth involved in your case is different in several relevant respects. I am well aware that it involved literal untruths intended neither to reveal deeper "Truth," like the myths of *Genesis*, nor to protect the innocent, as in the case of the Hebrew midwives. In your particular case, the President lied to conceal an improper sexual involvement with a young female employee. You were quite right to recognize that such a relationship is "deeply destructive of the kind of human flourishing fostered by the institutions of both marriage and mentoring," at least in the time and place in which you were working. And you were quite right to further assume that fabricating false stories to advance evil—or, as I prefer, to undermine human flourishing—is very near the immoral core of lying

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from the truth-absolutists. See, e.g., Thomas Aquinas, *Summa Theologiae* pt. 2.2, ques. 110, art. 4 (T.C. O'Brien trans., Blackfriars 1972) (n.d.) (discussing whether some lies are not sins); Augustine, *supra* note 71, at 42-63 (discussing the absolute nature of truth); John Murray, *Principles of Conduct: Aspects of Biblical Ethics* 141-42 & 142 n.12 (1957) (analyzing the Hebrew midwives story and citing to John Calvin).

\*74. The relevant sea, as it turned out, was shallow, and red; but that's another, longer, and more depressing story. See *Exodus* 14:1-15:21 (King James).

75. See Shine, *supra* note 72, at 740 n.90 ("The text goes on to say that God blessed the midwives for their deceptive action.").

76. MacIntyre, *supra* note 15, at 357.

and, consequently, at the heart of our mission. As in my original lie, the end damns the means—which is to say, commends them to us.

But I am afraid that you failed to focus precisely on the ends of the lies for which you and your allies, witting and unwitting, tried to get the President and Ms. Lewinsky in trouble. Recall that they were both asked, in the context of another woman's sexual harassment suit against the President, whether they had had a consensual sexual liaison. Both, in no uncertain terms, denied any such affair, which was clearly contrary to the facts of the matter. Their motives for their denials were doubtlessly mixed, and many of their motives were presumably unlovely. But notice—this is the critical point—how much their denials had to do with protecting their privacy from those who could not make any plausible claim to have been injured by the private conduct in question. Mr. Clinton was not being punished for lying to his daughter or his wife, nor was he being questioned at the behest of Ms. Lewinsky in support of a claim of hers against him.<sup>77</sup> The putative point of the question about his consensual sexual conduct with Ms. Lewinsky was simply this: to show that he may have been inclined to insist on non-consensual sex with another female employee, the plaintiff in the harassment case.

Able students of human nature that we are, you and I know that this is hardly an absurd line of questioning. Quite possibly, those who have *consensual* sex with employees are more likely to have *nonconsensual* sex with employees than those who never have *any* sex with employees—or with anyone else. Similarly, it makes some sense to assume that those who have committed other, prior crimes will have committed the particular crime with which they are currently charged. And it makes about as much sense—slightly less than none—to assume that those who have made a practice of consenting to sex will have consented to the particular act of sex that they and the authorities are now asserting to be rape.<sup>78</sup>

We are not much interested in the probative value of these facts; in fact, as I hardly need to remind you, our strong preference is that people be convicted for crimes they did not commit, and go scot-free of punishment for those they did. Sometimes, the introduction of such facts into trials, both civil and criminal, results in serious miscarriages of justice; in each such case, we deservedly rejoice. But each

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77. See Posner, *supra* note 10, at 35 ("There is no basis for accusing the President of sexual harassment of a subordinate."); see also *id.* at 137 (stating that "Clinton cannot fairly be accused of deception, seduction, overreaching, exploitation, taking advantage of an innocent or naive girl, retaliation, threats, or promises, in relation to Lewinsky").

\*78. Such was the assumption of the law itself until, alas, quite recently. See Francis A. Gilligan et al., *The Theory of "Unconscious Transference": The Latest Threat to the Shield Laws Protecting the Privacy of Victims of Sex Offenses*, 38 B.C. L. Rev. 107, 129 (1996) (noting permissive rule of admissibility of victim's prior sexual history and criticisms grounded, inter alia, in its "minimal probative value").



introduction of such evidence, regardless of whether it skews the proper result in the trial, has a collateral effect in which we can also rejoice: it discomfits people by holding up unpleasant aspects of their private lives to public scrutiny.<sup>79</sup>

I cannot over-emphasize how significant these invasions of privacy are for us. Never forget, my dear Dunkelstern, that our main aim, ever since our abortive take-over bid for the Enemies' home office, has been the subversion of human flourishing. As it happens, many of the more fundamental aspects of human flourishing require a large measure of privacy. Privacy is, for example, the natural habitat of two of our principal targets, romantic love and intimate friendship.<sup>80</sup> Therefore, to the extent that we can expose these to public scrutiny, we endanger relations dear to human beings and thus anathema to us.

Remember the ubiquity of Orwell's "Big Brother," and consider this, from the expatriate Czech dissident Milan Kundera:

An old revolutionary utopia, whether fascist or communist: life without secrets, where public life and private life are one and the same. The surrealist dream André Breton loved: the glass house, a house without curtains where man lives in full view of the world. Ah, the beauty of transparency! The only successful realization of this dream: a society totally monitored by the police.

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Of course . . . in private we bad-mouth our friends and use coarse language; that we act differently in private from the way we do in public is everyone's most conspicuous experience, it is the very ground of the life of the individual. Curiously, this obvious fact remains unconscious, unacknowledged, forever obscured by lyrical dreams of the transparent glass house, it is rarely understood to be the value one must defend beyond all others.

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*[W]hen it becomes the custom and the rule to divulge another person's private life, we are entering a time when the highest stake is*

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\*79. This discomfiture, rather than any probative value, is quite often the point of the revelation. As a professor at the University of Pennsylvania Law School pointed out in an Op-Ed piece in the New York Times, "Ms. Jones's lawyers wanted to get the President to admit some embarrassing facts about his personal life, because that would make him more willing to settle and, if the case ever got to a jury, would make the jury less sympathetic to him, whatever the merits of his defense." Leo Katz, *All Deceptions Are Not Equal*, N.Y. Times, Aug. 19, 1998, at A31. Professor Katz finds no fault with this tactic, implicitly embracing the theory of legal ethics that is, fortunately for us, the Dominant View. See *id.*; see also William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 7-11 (1998) (identifying and criticizing the Dominant View).

80. See Nagel, *supra* note 61, at 20 ("Interpersonal spheres of privacy protected from the public gaze are essential for human emotional and sexual life.").

the survival or the disappearance of the individual.<sup>81</sup>

You are, of course, quite right to point out that privacy, like lying and pretty much anything else, can be turned to bad purposes as well as to good.<sup>82</sup> A dimly moonlit wood is as easily a refuge for robbers and rapists as a haven for lovers and friends. And behind the closed doors of many a private home occurs much that is violent and unlovely and thus thoroughly to our liking. As Judge Posner points out: "All sorts of bad things happen in private."<sup>83</sup> So, alas, we must sometimes make tough choices. If we reduce the realm of privacy, we likely lose the occasion for evil as well as for good. Any reduction of privacy will diminish the possibilities of dark deeds even as it squeezes out opportunities for human flourishing in the same environment, all things being equal.

But bear in mind that such things are not always equal. Some forms of privacy are much more likely to produce human flourishing than harm, suffering, and our sort of stuff generally. Which takes us back to the President and Ms. Lewinsky: they were being compelled to testify about private, consensual sex acts at the behest of someone who had no direct legal or moral interest in those acts. In this context, the likely harm to human flourishing is very great, and the likely loss of opportunity of its opposite comparatively small (though certainly not nil).<sup>84</sup> The President's vindication, accordingly, was our grievous

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\*81. Milan Kundera, *You're Not in Your Own House Here, My Dear Fellow*, N.Y. Rev. of Books, Sept. 21, 1995, at 21, 24 (emphasis in original). The same note, thankfully muffled in purplish, turn-of-the-century academic prose, was sounded a century ago by Warren and Brandeis:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren & Brandeis, *supra* note 9, at 196.

Not surprisingly, Starr himself pays lip service to this principle: "All Americans, including the President, are entitled to enjoy a private family life, free from public or governmental scrutiny." Office of the Independent Counsel, Referral to the United States House of Representatives pursuant to 28 U.S.C. § 595(c), H.R. Doc. No. 105-310, at 5 (2d Sess. 1998) [hereinafter Starr Report].

\*82. On that point—as on most others—the Bishop of Hippo was dangerously insightful, if not entirely correct. See Augustine, *On the Free Choice of the Will* bk. 2, ch. XIX, §§ 191-192, at 80-81 (Anna S. Benjamin & L. H. Hackstaff trans., Prentice-Hall 1964) (n.d.). But see Augustine, *supra* note 71, at 43-63 (discussing the absolute nature of truth).

83. See Posner, *supra* note 10, at 210.

84. See *id.* at 35 ("Such statutes [that forbid consensual sex between adults] are dead letters, more embarrassing to the legislatures unable to muster the political will to repeal them than to the violators."); Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 Ind. L. Rev. 399, 400 (1991) (proposing "repeal of adultery legislation because continued criminalization improperly interjects the State into one of the most private decisions a person

loss—not, as you vaingloriously boasted, “our Great and Glorious Gain.”

There are, you will object, two final, dispositive differences between the lies in this case and all the others I have alluded to. First, these lies were also perjury. Clinton and Lewinsky testified falsely, under oath, in a legal proceeding, thus breaking the law.<sup>85</sup> Second, Clinton was, at the very time he broke this particular law, the principal enforcer of the law in general,<sup>86</sup> and he seemed to have acted with the connivance of his lawyers, themselves sworn “officers of the court.”<sup>87</sup>

With respect to the problem of illegality, remember Their principal jurisprudential position: “The letter killeth, but the spirit giveth life.”<sup>88</sup> Indeed, as one of Their greatest prophets repeatedly pointed out, violations of the letter of the law, narrowly read, may be very much in keeping with its spirit, subtly understood—healing the sick or feeding the hungry on the Sabbath, for example.<sup>89</sup> To show you, with respect to your second objection, that this also goes for lawyers and other officers of the law, I will have to tell you a story.

It is a story about one of your jurisdiction’s most paradigmatically virtuous lawyers, Atticus Finch. It is not, I hasten to add, a “true” story, but on the basis of what I’ve already said, I hope this fact will not interfere with your appreciation. Once upon a time, Atticus connived in an official cover-up, which almost certainly involved perjury by a government official in one of the common law’s most ancient and honored formal institutions, a coroner’s inquest. Have I got your attention?

This cover-up occurred in the denouement of *To Kill a Mockingbird*,<sup>90</sup> the Gospel According to Atticus’s Daughter, Scout. Atticus’s famous, but famously unsuccessful, defense of a black man falsely accused of raping a young white woman, Mayella Ewell, had humiliated both Ms. Ewell and her father, Robert E. Lee Ewell. In

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makes—choosing a sexual partner”).

\*85. If you’d prefer a judge’s opinion on the point, although an opinion not uttered *ex cathedra*, see Posner, *supra* note 10, at 36-52, where Judge Posner argues that Clinton committed many acts of perjury and obstruction of justice.

\*86. This is, of course, the Independent Counsel’s position. See Starr Report, *supra* note 81, at 7 (“In view of the enormous trust and responsibility attendant to his high Office, the President has a manifest duty to ensure that his conduct at all times complies with the law of the land.”).

\*87. An early and, so far as I can tell, entirely conscientious suggestion that lawyers are not just entitled, but sometimes professionally obliged, to lie for clients elicited almost literal howls of protest. Cf. Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 8 (1951) (proposing that a lawyer may lie for his client in certain situations).

88. 2 *Corinthians* 3:6 (King James).

89. See *Luke* 6:1-5 (King James) (feeding the hungry); *id.* 6:6-11 (healing the sick); *id.* 14:1-6 (same); *Mark* 3:1-6 (King James) (healing the sick); *id.* 2:23-28 (feeding the hungry); *Matthew* 12:9-14 (King James) (healing the sick); *id.* 12:1-8 (feeding the hungry).

90. Harper Lee, *To Kill a Mockingbird* (1960).

revenge, Mr. Ewell had attempted the murder of Scout and her older brother, Jem, on their way home from a school Halloween carnival. His murderous assault left Jem with a broken arm and a concussion, and Scout's Halloween costume slashed down to its chicken-wire frame. In the nick of time, a benevolent neighborhood recluse, Arthur "Boo" Radley, intervened. In the ensuing scuffle, Mr. Radley killed Mr. Ewell with a kitchen knife. He then carried Jem home, followed by a badly battered Scout.<sup>91</sup>

After the family doctor had patched Jem up and Atticus had introduced Scout to her self-effacing savior, Heck Tate, the local sheriff, engaged Atticus in a heated ethical debate on the Finch's front porch.<sup>92</sup> Atticus, rattled by the evening's near-tragedy, initially assumed that his son had fatally stabbed Mr. Ewell before being flung down and knocked unconscious.<sup>93</sup> Reflexively ready to do the right thing and already anticipating a coroner's inquest, Atticus began rehearsing to the sheriff his self-defense argument on behalf of his son.<sup>94</sup> The sheriff interrupted to say that Jem had not killed Mr. Ewell. Instead, the sheriff insisted that Ewell had fallen on his own knife. Atticus took this as an invitation to hush the matter up by concocting a false account to exonerate his son. He thanked the sheriff for his good-hearted faithfulness to old friends, but adamantly refused to allow any cover-up. His reason was the need to set an example of fundamental moral integrity for his children: "[I]f they don't trust me they won't trust anybody. Jem and Scout know what happened. If they hear of me saying down town something different happened—Heck, I won't have them any more. I can't live one way in town and another way in my home."<sup>95</sup>

Atticus only realizes what really happened when the sheriff shows him Ewell's knife—not a kitchen knife, but a switchblade—and reveals his real motive for covering up the truth—to protect not Jem, but "Boo" Radley: "To my way of thinkin', Mr. Finch, taking the one man who's done you and this town a great service an' draggin' him with his shy ways into the limelight—to me, that's a sin. It's a sin and I'm not about to have it on my head."<sup>96</sup> With that, the sheriff stamps off into the night, leaving Atticus alone on the porch with Scout and Boo.

Atticus has finally come around to Sheriff Tate's position, but now

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91. See *id.* at 275-77.

92. See *id.* at 285-88. In the Academy Award-winning movie version, it is the same front porch on which Atticus had made his fateful decision to defend a black man against the Ewells' false rape charge. See Horton Foote, *To Kill a Mockingbird*, in *To Kill a Mockingbird*, Tender Mercies, and The Trip to Bountiful: Three Screenplays 17-18 (Grove Weidenfeld 1989) (1964).

93. See Lee, *supra* note 90, at 286.

94. See *id.* at 286-88.

95. *Id.* at 288.

96. *Id.* at 290.

he must face Scout with the lie. Knowing that she knows the truth, he tells her that Ewell fell on his own knife and then asks, "Can you possibly understand?"<sup>97</sup> To his immense relief, she does: "Yes sir, I understand. . . . Mr. Tate was right. . . . Well, it'd be sort of like shootin' a mockingbird, wouldn't it?"<sup>98</sup>

Nothing could have reassured Atticus more than Scout's analogy. It both recalled and expanded his own teaching. Early in the novel, Atticus had explained to Jem why it was a sin to kill a mockingbird.<sup>99</sup> By extrapolating the fundamental principle of Atticus's juvenile injunction about sparing innocent songbirds into this deeply troubling, thoroughly adult context, Scout showed herself to be a complete master of Atticus's Gospel.<sup>100</sup> Moreover, by alluding to the book's title, she assures readers of the book's moral take on the matter: in this case, the imperative of protecting privacy trumps the value of telling the truth, even by the local sheriff—"the law"—even in a judicial proceeding. This lesson has not been lost on generations of American readers. They invariably side with Sheriff Tate, Atticus, Scout, Harper Lee, and (at least implicitly) the Pulitzer Prize Committee.<sup>101</sup> They take the side of privacy against truth.<sup>102</sup>

I have neither time nor patience to consider with you whether they are all wrong by some ultimate standard. Again, the standard that matters to them—and hence, albeit by negation, to us—is this: human flourishing. Empathizing with Atticus's agonizing, his fans duly acknowledge the presumptive moral and legal importance of truthfulness. But when truthfulness—even legally compelled truthfulness—threatens to blight the flourishing of a single individual—even a sadly stunted individual—by destroying his privacy—even a bizarre and pathological privacy—they choose steadfastly to protect that privacy.<sup>103</sup> And we, accordingly, must

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97. *Id.* at 291.

98. *Id.*

99. *See id.* at 98.

100. *See* Rob Atkinson, *Liberating Lawyers: Diverging Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 Duke L.J. (forthcoming Dec. 1999).

101. *See, e.g.*, Thomas L. Shaffer with Mary M. Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* 94-95 (1991) (observing how his students invariably side with Atticus Finch whenever he tries to suggest that Atticus might have made moral mistakes); *see also* Anderson, *supra* note 65, at 12 ("Lying, under oath or otherwise, is, in fact, the appropriate response to questions which the questioner is not entitled to ask or have answered.").

\*102. \*Not everyone, thankfully, takes that view. The national Legion of Decency, which rated movies for Roman Catholics until its disbanding in 1980, took a dim view of this debate between Atticus and the sheriff and was instrumental in having it edited to make Atticus a victim of the sheriff's lie rather than a party to it. *See* Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* 16 (1985); Thomas L. Shaffer, *On Lying for Clients*, 71 Notre Dame L. Rev. 195, 202 (1996).\*

103. *See* Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. Pa. L. Rev. 913, 923 (1990) ("To be sure, lawyers, like others, may encounter exceptional crises in which a lie offers the only alternative to save, say, an innocent life, and in which they are certain

lament their success—not, as you say in Clinton's case, "celebrate their breach of law and their resort to lying." Remember: the ends damn—or from Their perspective, redeem—the means.

I also have neither time nor inclination to worry with you over whether Clinton's lies come fully under the protection of Atticus's precedent. This much should be clear, even to you: if his case reminded the American people that, by their own deeply held principles, what is legal is not always what is right—nor illegal, wrong—and, even more importantly, that the virtuous must sometimes suppress truth—or even lie—to preserve other values, then you have done our cause a great disservice.<sup>104</sup> You have led them, not away from their traditional values, but back to them.

And it will hardly do to argue—as I anticipate you will—that you have, at the very least, called those basic values and their proper balance into question. Undoubtedly you have done just that. But you seem to have forgotten that calling fundamental values and their ordering into question is perhaps their most ancient and enduring form of flourishing, the prerequisite of all the rest.<sup>105</sup> If you have forgotten everything else from your (very expensive!) legal education, surely you can't have forgotten that lesson, drilled into us, as it was, from both the Dialogues and the Scriptures. "Come," say their prophets, their philosophers, their very gods—all of our Enemies—with one voice, "and let us reason together."<sup>106</sup>

### C. *Lying and the Law*

Let me anticipate a final and, to your credit, fundamental, objection. If breaking the law, particularly telling illegal lies, sometimes promotes human flourishing, and if human flourishing is the ultimate end of law, then why doesn't the law specifically allow lies in such cases? This question takes us very close to the core of Their jurisprudence, the thoroughly obnoxious insight that the letter killeth but the spirit giveth life.

On the subject of lying by lawyers for clients, we share the position

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that they will be able to justify their choice publicly once the crisis is over."); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 Or. L. Rev. 775, 776 (1997) ("[L]ying that is necessary to save a life may not only be acceptable but is generally applauded (even if it constitutes perjury).").

104. *But see* Starr Report, *supra* note 81, at 6 ("Perjury and attempts to obstruct the gathering of evidence can never be an acceptable response to a court order . . .").

105. *See* Posner, *supra* note 10, at 263 ("[T]he ordeal of Clinton's Presidency has gotten people thinking seriously about important issues—issues of law, morality, constitutional structure, public opinion, and political behavior.").

106. *Isaiah* 1:18 (King James) ("Come now, and let us reason together, [says] the Lord"); *see also* Plato, *Crito* st. 9, in *Euthyphro, Apology, Crito* 51, 58 (F.J. Church trans., Bobbs-Merrill Co. 2d ed. 1956) (n.d.) (Socrates to Crito, on the eve of the former's execution: "Let us examine this question together, my friend, and if you can contradict anything that I say, do so, and I shall be persuaded").

of the American Bar Association and most state bar associations,<sup>107</sup> which also has the imprimatur of the United States Supreme Court:<sup>108</sup> lawyers should be categorically forbidden to lie for clients and categorically compelled to reveal when clients have lied in court. But we hold that position for reasons different from those of the organized bar. For most of the bar, this is a second-best default position; for us, it is the second-worst. Again, permit me to explain.

The ideal humanistic law on lying would favor lies that promote human flourishing and disfavor lies that undermine human flourishing. Our anti-ideal, of course, would be the reverse. It is hardly surprising that human law-makers have not adopted our position. Curiously, they have not adopted their own ideal either.

With respect to one side of the ideal humanist equation—disfavoring lies that undermine human flourishing—the law comes pretty close. Thus, for example, the law of defamation punishes intentional falsehoods that injure someone's reputation,<sup>109</sup> and the law of fraud penalizes false inducements that deprive people of their property.<sup>110</sup> With respect to the other side of their ideal equation, favoring lies that promote human flourishing, the law's position is far less clear. Lying is not per se illegal. It would, however, be wrong to infer from this that the law is free of the truth-fetishism that our Firm has so firmly promoted—the misguided notion that all lies are immoral, in some sense inherently wrong or invariably productive of greater harm than good. Some lies may be legally tolerated because they are believed harmless,<sup>111</sup> or even beneficial. But their perceived moral wrongfulness may be tolerated simply because the cost of enforcing their prohibition exceeds the anticipated benefit.<sup>112</sup>

However difficult it may be to state the law's general position on

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107. See Model Rules of Professional Conduct Rule 3.3 (1998) (stating that a lawyer shall not knowingly make a false statement to a tribunal); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987) (stating that a lawyer must disclose a client's perjury to a tribunal).

108. See *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (upholding lawyer's adherence to this position against client's objection that it denied him effective assistance of counsel).

109. See Restatement (Second) of Torts § 558 (1977) (setting forth the elements of a cause of action for defamation).

110. See *id.* § 525 (defining the tort of fraudulent misrepresentation).

111. See Posner, *supra* note 10, at 45 (explaining the materiality requirement of federal perjury law as partly attributable to the fact that "the law generally leaves harmless acts alone even when done with an improper motive").

112. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & Econ. 67, 83-86 (1973) (arguing that increased governmental monitoring of certain forms of fraud may not be economically efficient because government monitoring is likely to suffer the same transaction costs and information asymmetries as private parties). See generally Alan Strudler, *Incommensurable Good, Rightful Lies, and the Wrongfulness of Fraud*, 146 U. Pa. L. Rev. 1529 (1998) (arguing that lying in negotiation is moral as well as legal, not immoral but legal, which is the conventional wisdom).

lying, its treatment of the particular kind of lying that is of central interest to us in the Lewinsky affair is clear. Perjury, lying under oath in a judicial proceeding,<sup>113</sup> is illegal for fairly obvious reasons. In liberal regimes, a fundamental purpose of trials is to discover truth,<sup>114</sup> so that law can be justly applied to the facts of the case. Again, the end justifies the means, or at least this can safely be presumed true most of the time. The particular prohibition against perjury, in other words, is a corollary of the general principal that, for justice to be done in judicial proceedings, the truth should be revealed.

Mr. Starr, as you might expect, steadfastly maintains that "[T]ruth is intended to be the paramount object of our system."<sup>115</sup> But there are revealing exceptions that even Starr has to concede.<sup>116</sup> Their system of justice clearly reflects the position, which we have already seen in their literature, that other values may sometimes trump truth.<sup>117</sup> Consider, for example, the precedence that competing values, particularly the value of privacy, take over discovery of truth in criminal cases. In the law of your jurisdiction, as in that of all liberal republics, protections of individual freedoms severely circumscribe the search for truth in criminal cases under the fundamental law itself, the Constitution, particularly its Bill of Rights.<sup>118</sup> In the words of one commentator:

We are concerned, however, with far more than a search for truth, and the constitutional rights that are provided by our system of justice serve independent values that may well outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, may well impede it.<sup>119</sup>

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113. For a more formal definition and an extended analysis, focussing on federal law, see Kathryn Kavanagh Baran and Rebecca I. Ruby, *Perjury*, 35 Am. Crim. L. Rev. 1035 (1998). See also Posner, *supra* note 10, at 36-52 (analyzing President Clinton's conduct under federal perjury and obstruction of justice statutes).

\*114. Bringing truth to light that justice may be done is not, of course, a fundamental purpose of trials in all regimes. See generally Arthur Koestler, *Darkness at Noon* (Daphne Hardy trans., 1941). Fiction though it may be, Koestler's depiction of Stalin-era show-trials represents our Moscow office's finest hour; read it, my friend, and weep for your posting to America.

115. Starr, *supra* note 17, at 903.

\*116. Indeed, the concession comes in the very next sentence, though only by implication: "Most of our rules of procedure, our rules of evidence, even many of our rules of substantive law are designed to facilitate the search for truth." *Id.*

117. See John H. Wigmore, *Wigmore's Code of the Rules of Evidence* § 8 (3d ed. 1942) (relevancy rule); 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5480 (1986) (attorney-client privilege); see also Charles W. Ehrhardt, *Florida Evidence* §§ 501-10 (1999) (state privilege rules unrelated to discovery of truth). See generally Michael H. Graham, *Handbook of Federal Evidence* (4th ed. 1996 & Supp. 1999) (listing evidentiary rules and their exceptions).

118. See, e.g., U.S. Const. amend. IV (forbidding illegal searches and seizures); *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961) (excluding otherwise reliable information because its seizure infringed upon the constitutional rights of defendant).

119. Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. Pa. L. Rev. 1060, 1063 (1975).



Nor are civil suits immune from such considerations. In both civil and criminal cases, some kinds of "truth" or "fact" are so likely to produce bad results that they are excluded—hearsay, for example.<sup>120</sup> Other sources of highly relevant evidence involve relationships so sacrosanct, so essential for human flourishing, that they are "privileged." Thus, for example, under the attorney-client privilege, lawyers cannot generally be compelled to testify against their clients,<sup>121</sup> analogous privileges protect confidences shared with spouses,<sup>122</sup> doctors,<sup>123</sup> psychotherapists,<sup>124</sup> and (perhaps most gallingly!) religious counselors.<sup>125</sup> Sometimes the substance—as opposed to the source—of information is problematic. The information may be more prejudicial than probative within the trial itself,<sup>126</sup> or its revelation in the public arena of adjudication may prove more embarrassing than probative.<sup>127</sup> In these cases, the cost in privacy exceeds the benefit to fact-finding. The prejudice problem informs the general exclusion of evidence of prior crimes,<sup>128</sup> and, in the context of gathering and admitting evidence of sexual history, courts must weigh both prejudice and privacy concerns.<sup>129</sup>

And there simply isn't world enough or time for all conceivably relevant information to be presented in court. Character testimony is generally excluded on that basis;<sup>130</sup> beyond some point, additional increments of even the most obviously relevant evidence must be excluded as cumulative. Finally, sometimes the means of extracting evidence, particularly testimony, are deemed too harsh for

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120. See 3 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 1463-68 (7th ed. 1998).

121. See 2 *id.* at 697-717.

122. See *id.* at 821-28.

123. See *id.* at 805-06.

124. See *Jaffee v. Redmond*, 518 U.S. 1, 10-15 (1996); 2 Saltzburg et al., *supra* note 120, at 836-38.

125. See *In re Verplank*, 329 F. Supp. 433, 435-37 (C.D. Cal. 1971); 2 Saltzburg et al., *supra* note 120, at 805.

126. See Fed. R. Evid. 403.

127. See Fed. R. Evid. 412 advisory committee's note.

128. See Fed. R. Evid. 404(b).

129. See Gilligan et al., *supra* note 78, at 129-31. Thus, in cases of sexual misconduct, Federal Rule of Evidence 412(a)(1) limits the admissibility of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior," subject to certain exceptions enumerated under 412(b). In civil cases, past sexual conduct is admissible only when "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Fed. R. Evid. 412(b)(2). The rationale for the protection is to safeguard the "alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping . . . encourag[ing] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." Fed. R. Evid. 412 advisory committee's note.

130. See Fed. R. Evid. 404 advisory committee's note (referring to the balancing test expounded in Rule 403 regarding introduction of evidence that is only of slight probative value). *But cf.* Fed. R. Evid. 413 (allowing admission of defendant's uncharged sexual misconduct as evidence of propensity to commit rape).

contemporary tastes, or too likely to produce lies—gone, alas, are the good old days of the rack and the screw.<sup>131</sup>

Sometimes these filters are absolute, or nearly so, as in the case of the attorney-client privilege. If the information in question is shown to be within the scope of the protective rule, the information is presumed protected, without a further showing that the application of the protection in the particular case would outweigh the countervailing loss of relevant evidence. Sometimes, on the other hand, the application of the protective rule requires just this sort of balancing by the judge.<sup>132</sup> These restrictions operate at the “retail” rather than the “wholesale” level. “Retail” rules of discovery and admissibility are necessarily flexible, their application left to the sound discretion of the trial judge. It is up to him or her to decide, in the circumstances of the particular case, whether pursuit of a particular line of inquiry—or introduction of the results of such inquiry in court—is sufficiently probative to counterbalance its costs in other values, such as the invasion of privacy or the likelihood of producing prejudice.<sup>133</sup>

Precisely this task faced Judge Wright in Paula Jones’s sexual harassment case against President Clinton. Ms. Jones and her lawyers sought discovery of the names of women, other than the First Lady, with whom the President had sexual relations, asserting its relevance to proving a pattern or practice of sexual harassment. The President’s lawyers, predictably, opposed such discovery. In explicit deference to the office of the President, Judge Wright established a “meticulous standard” of materiality for discovery of such evidence in the Jones case.<sup>134</sup>

Even the best of judges make these retail determinations on the basis of limited facts. They do not know, *ex hypothesi*, what the inquiry will produce or how much that production will cost in terms of other values. They know even less about the motive for the inquiry. By contrast, the party being investigated may well be in an ideal position to know the cost of answering certain questions, and may also have a very good sense that the questions are being asked principally to criticize or embarrass, not to promote justice. Unlike the judge, however, the party being investigated has every incentive to weigh

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131. See *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (stating that the privilege against self-incrimination reflects the “fear that self-incriminating statements will be elicited by inhumane treatment and abuses”); see also John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 5-8 (1978) (discussing the dubious probative value of evidence obtained through torture).

132. See Fed. R. Evid. 403, 412(b)(2).

133. See Fed. R. Evid. 104(a), 403.

134. Starr Report, *supra* note 81, at 131; see also *Jones v. Clinton*, No. LR-C-94-290, 1998 Extra LEXIS 52, at \*6 (E.D. Ark. Mar. 13, 1998) (quoting *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990) (applying the “meticulous standard” to an interrogatory that the President objected to as being overly broad).

personal interest at an improper premium, and may be unconcerned, or uninformed, about countervailing public policies.

By contrast, the lawyer for the party being investigated stands, at least in principle, somewhere between the client and the judge. Like the judge, the lawyer is likely to understand the policy basis of the law's balance of values that lies behind rules of discovery and admissibility. On the other hand, with respect to the application of those rules to a particular case, the lawyer is sometimes in a much better position than the judge to know several key variables, including the content of the information sought and the likely cost to the client of its revelation. This middle position of the lawyer—more knowledgeable of law than the client, more knowledgeable of facts than the judge—presents the law with a tantalizing prospect: why not let the client's private lawyer overrule the judge, in the name of the law, in such cases where the lawyer can see that public good and private need coincide?<sup>135</sup>

Fortunately for us, the law cannot avail itself of the lawyer's superior position for several obvious reasons. Most significant is the patent fact that not all lawyers can be trusted to try to do justice. Given the chance to preclude discovery or admission of evidence because it would frustrate public policies competing with the judicial search for truth, some lawyers would invariably tip the scales to favor their client's narrow interests over the broader interests of justice, human flourishing in general. These lawyers would invoke the power to protect client information not only in those cases where it served both public and client interests, but also in cases where it served client interests at the expense of public interests.<sup>136</sup>

For this reason, among others, lawyers for one side cannot be deputized as "officers of the court" in such evidentiary matters in the first instance. But the possibility of lawyers unilaterally cutting off inquiry into their clients' affairs in the name of justice can become relevant in another context, one quite close to the Clinton case. Even if lawyers cannot be allowed legally to shield client secrets in the name of the law, they could do so illegally by assisting their clients in lying about the existence or content of such secrets.<sup>137</sup> It is important to note that they might assist in such client lies for either of two very different reasons that we have already noted: to advance client

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135. See Simon, *supra* note 79, at 31-33 (arguing the converse position, that lawyers should decline to assist clients in availing themselves of favorable rules, like statutes of limitations, when the application of the rule in a client's particular case would subvert, rather than advance, the rule's general purpose).

136. See, e.g., Geoffrey C. Hazard, *Tobacco Lawyers Shame the Entire Profession*, Nat'l L.J., May 18, 1998, at A22 (criticizing the perversion and exploitation of the attorney-client privilege by defense counsel to conceal documents from plaintiffs).

137. See Model Rules of Professional Conduct Rule 1.2(d) (1998) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

interests congruent with the concerns of justice, or to advance client interests antagonistic to justice. As long as the latter is a possibility—and we have good reason to hope it always will be—lawyers cannot be generally allowed to lie for their clients, any more than they can be allowed to act as deputy judges to determine whether such matters should be investigated.

But lawyers who lie for clients for virtuous reasons could be treated more leniently if they are caught. They would, of course, bear the burden of convincing the trier of fact that their motives were pure. Even without an explicit exception in favor of “virtuous perjury,” the law could encourage judges and prosecutors to pursue and punish only “bad” lies, and to deal leniently with “good” lies. There is good reason to believe that the law sends precisely this message, and good reason to fear that wise judges and prosecutors heed it. General guidelines for prosecutors typically counsel against politically motivated prosecutions<sup>138</sup> and against bringing suits where the public injury is slight or the likelihood of disproportionate punishment great.<sup>139</sup> Sentencing guidelines, formal and informal, typically call for consideration of a range of mitigating factors that could easily be read to counsel in favor of leniency toward virtuous liars.<sup>140</sup> Under these guidelines, sagaciously applied, virtuous liars and their lawyers would never be worse off, and should generally be better off, than under a regime that treated all perjury as equally bad.

This approach would, of course, have the very effect we dislike: it would tend to encourage lying that promotes human flourishing—lying consistent with the spirit of the law—even as it discouraged lying to advance a client’s purely selfish or anti-social interests. It is unlikely, of course, that any such regime will ever be formally implemented. Upon closer inspection, it may turn out to be unworkable because, for example, it involves excessively high administrative costs. In particular, giving judges wide sentencing discretion notoriously introduces elements of uncertainty and apparent arbitrariness into the system of justice.<sup>141</sup> More likely, such a

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138. See Standards Relating to the Admin. of Criminal Justice Standard 3-3.9(c) (1992) (“In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages . . . which might be involved . . .”).

139. See *id.* Standard 3-3.9(b)(ii)-(iii) (listing as legitimate factors in the exercise of prosecutorial discretion “the extent of harm caused by the offense” and “the disproportion of the authorized punishment in relation to the particular offense or the offender”).

140. See, e.g., U.S. Sentencing Guidelines Manual § 5K2.11 (1998) (suggesting that when a defendant commits “a crime in order to avoid a perceived greater harm . . . a reduced sentence may be appropriate, provided that the circumstances significantly diminish society’s interest in punishing the conduct”); ABA Standards Relating to the Admin. of Criminal Justice Standard 3-6.1(a) (stating that prosecutor “should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities”).

141. See S. Rep. No. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221

regime will never even be considered seriously, on account of the wide-spread, wooden-headed truth-fetishism that works so well for us, here as elsewhere.

But the general acceptance of such a regime as morally principled is anathema to us, even if that regime never comes to realization in practice. Acculturation that disfavors all lies as both morally evil and legally inappropriate is more likely to influence the virtuous than the vicious. The virtuous, we can be reasonably certain, will be reluctant to lie in violation of the law, even to promote justice and even when they can get away with it. The vicious, it is safe to assume, will lie when lying works to their advantage and they won't get caught. Accordingly, a regime that condemns all perjury as legally and morally wrong will tend, at the margin, to over-deter the virtuous liar and under-deter the vicious.

That, however, is not the most significant factor; relatively few lawyers, even the conscientious, can afford the personal and professional risks of conscientious law-breaking.<sup>142</sup> What is more important for us is that the typical lawyer does not realize the tragedy of rules that forbid lying, even lying to advance justice. Without that lesson, the law looks foolish, blunt, and cruel, both to the lawyers themselves and to the ordinary citizens who are their clients. It is salutary for us if as few as possible of them know the truth, that the law cannot be made more sympathetic to virtuous lying, though its own spirit yearns to transcend the limits of its letter, here as elsewhere. If this truth were widely known, the practical effects would be very bad for us indeed.

Consider the case of a client in dire straits, an innocent who desperately needs to lie to prevent a miscarriage of justice<sup>143</sup> or a gross invasion of personal liberty. As we have seen, there may be little that can be written into the letter of the law directly to assist. But imagine what a comfort it would be to such clients for their lawyers to

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(giving the existence of significant disparities in sentencing as a reason for federal sentencing reform); Executive Advisory Comm. on Sentencing, Crime and Punishment in New York: An Inquiry into Sentencing and the Criminal Justice System 33 (1979) (stating that "similar offenders committing similar crimes often receive vastly dissimilar sentences").

142. See, e.g., *In re Lida*, 627 N.Y.S.2d 688, 689 (App. Div. 1995) (suspending respondent from the practice of law for three years after he was convicted of conspiracy to launder monetary instruments and 16 counts of laundering monetary instruments); *In re Coughlin*, 616 N.Y.S.2d 726, 727 (App. Div. 1994) (suspending respondent from the practice of law subsequent to his entry of a guilty plea to a charge of education fraud, in violation of 20 U.S.C. § 1097(a) (1994), which is a felony); *In re Beck*, 608 N.Y.S.2d 420, 421 (App. Div. 1994) (striking respondent from the roll of attorneys authorized to practice law in New York subsequent to his plea of guilty to a charge of a scheme to defraud in the first degree under the New York penal law).

143. For an example of such a situation, see Monroe H. Freedman, *Understanding Lawyers' Ethics* 113-14 (1990).

be able to tell them, "I can't help you in your lie, because the risk to me is too great," rather than, "I won't help you, because lying is legally forbidden and morally wrong." And how much more a comfort it would be if a sympathetic lawyer could explain to a desperate client:

In its spirit, which is justice, the law, along with those who love the law, are at one with us; if it could be so written, the law would allow your just lie. But it cannot be. This, my suffering fellow, is the tragic truth. It is not a truth that can free you of the letter of the law, because the letter of the law cannot be made to distinguish the virtuous lie from the vile. But it is a truth that can free you from the condemnation of the spirit of the law. This is why we can imagine Judges who look not upon outer appearances, but into the heart, and not fallibly, but perfectly. Even as we are told such Judges blessed the Hebrew midwives in their lie, so we may rest assured They would absolve you of yours.

It would be bad enough for us if lawyers knew enough to convey this comfort to their clients. Matters would be even worse, however, if judges understood the law's problem with virtuous lying. They, like the lawyer, could announce in appropriate cases that virtuous lies, though penalized by law's letter when proved, are never condemned by its spirit. But that would not be all. The judge's announcement, unlike the lawyer's, would come from law's virtual incarnation, in justice's secular temple. Under the letter of the law, such announcements would be meaningless, invisible, and unreviewable—*obiter dicta*. But in the moral sphere, which is the domain of law's spirit and humanity's flourishing, these words would be benediction.

Such a benediction would have to be doubly contingent. It would depend, first, on the particular liar's actually being virtuous, having lied to promote rather than thwart human flourishing. Second, and more generally, such a benediction would depend on the accuracy of the assessment that virtuous lying can actually promote human flourishing. All that the judge can say on either score is "I believe." She or he cannot say "You are right," but only "I believe you are right." But the latter pronouncement's very contingency makes it, for our purposes, more dangerous. With it, the judge implicitly admits the defendant into a moral dialogue, rather than merely pronouncing a final, legal sentence. The application of law may come down to a final judicial fiat, but the practice of justice must always be a matter of on-going dialogue. If lawyers and judges realize that, and bring it to bear in the actual cases of concrete individuals, human courts will be much less Hellish. They may not be more Heavenly, but they will certainly be more humane. Let us earnestly hope that does not happen and redouble our work to prevent it.

## II. COMMENTARY

As I stated at the outset, letting the Scriptures of Israel and the Church speak for themselves may well be sound advice; whether the same holds true for the text you have just read is another question. Indeed, letting the Devil be his own advocate under these conditions poses several related questions: whether it is appropriate to publicize the confidential communications of an opponent that one receives in a mis-mailing; whether the views of this particular opponent should be aired, at all or in this particular forum; and whether those views should be credited, either as genuinely those of their author or as true irrespective of their source. These questions, in that order, will be the subject of this part.

A. *Appropriateness of Publicizing Intercepted Communication from an Opponent*

In publishing Satan's memo to Dunkelstern, which seems to have been sent inadvertently to my e-mail address at the Florida State University College of Law,<sup>144</sup> I risk running afoul of ABA Formal Opinion 92-368.<sup>145</sup> That opinion considered the ethical responsibility of "a lawyer who comes into possession of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer."<sup>146</sup> After weighing various policy factors and consulting several analogous bodies of law, the ABA Standing Committee on Ethics and Professional Responsibility concluded that "the receiving lawyer, as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, (a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition."<sup>147</sup> I read the e-mail, in violation of (a), failed to notify Satan of my having received it, as required by (b), and published it, presumably against

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144. Not all recipients of such materials have been as forthcoming about their sources as I have. Compare C.S. Lewis, *supra* note 1, at 9 ("I have no intention of explaining how the correspondence which I now offer to the public fell into my hands."). In Lewis's case, however, there was admittedly a more active role on the part of the recipient. See *id.* ("The sort of script which is used in this book can be very easily obtained by anyone who has once learned the knack; but ill-disposed or excitable people who might make a bad use of it shall not learn it from me."). I, unlike Lewis, am firmly committed to dialogue across the deepest ideological chasms, heedless of emotional costs—how else could I conscientiously serve on an American law faculty?

145. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992), reprinted in [1991-1995 Ethics Opinions] Lawyers Manual on Professional Conduct (ABA/BNA) 1001:155 (Nov. 10, 1992).

146. *Id.*

147. *Id.*

the binding instructions he is entitled to issue me under (c).

Of course, neither the ABA's Model Rules nor their official interpretations in the Formal Opinions of the ABA Standing Committee on Ethics and Professional Responsibility have the force of law. But the majority of states have adopted versions of the Model Rules, albeit often in amended form.<sup>148</sup> In addition, many states have followed the ABA's lead on mis-sent communications, and few have fundamentally departed from it.<sup>149</sup> Because I am not an active member of any state bar, I did not technically receive the e-mail as a lawyer. Accordingly, I may not be within the scope of the ABA's opinion, and in any case, I am not subject to the general supervisory discipline of any state's bar. I am, however, a long-standing member of the ABA, and presumably subject to its equivalent of excommunication. It would also certainly embarrass me, as one who teaches legal ethics, if I were caught flouting the spirit of rules, the letter of which my students will, in due course, disobey at their professional peril. The spirit of this particular rule—concern about confidentiality and fair play—surely applies to those who teach law as well as to those who practice it.

I have confessed elsewhere the heretical opinion that lawyers may legitimately find themselves in opposition to the spirit, as well as the letter, of particular laws, even when that spirit accurately reflects wide and deep public agreement.<sup>150</sup> But I find myself in virtually complete agreement with the policy reasons that the ABA adduces in Formal Opinion 92-368. Thus I am not in the position of the classic civil disobedient, openly violating the letter of a law to call public attention to the law's inconsistency with higher public norms, legal or moral. Rather, I believe that the letter of the law governing lawyers, as interpreted in the ABA's Opinion, is much in accord with its spirit.

Nevertheless, although I affirm the ABA's principle, I doubt the efficacy of its announced rule in practice. The rule's real problem is the likely asymmetry of its operation. Most conscientious lawyers would not take unfair advantage of mis-sent messages, even in the absence of a rule; unscrupulous lawyers will continue to take every unfair advantage they can, even violating rules when, as is likely with this one, they can do so without getting caught. In the absence of a prohibitory rule, some conscientious lawyers—those closest to my own position—would, however, use a mis-sent message to prevent a

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148. See Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 3 (1999).

149. See *Lawyers Manual on Professional Conduct* (ABA/BNA) 55:418-20. *But cf.* Restatement (Third) of the Law Governing Lawyers § 112 reporter's note, cmt. m (Proposed Final Draft No. 1, Mar. 29, 1996) (maintaining that the ABA Opinion is not supported by decisional law, at least as to disclosures that have lost the protection of the attorney-client privilege).

150. See Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 Md. L. Rev. 853, 902 (1992); Atkinson, *supra* note 23.



manifest substantive injustice or to disadvantage an obviously unscrupulous opponent.<sup>151</sup>

In the final analysis, my position is awkwardly ironic. I am assuming that the law forbidding use of mis-sent messages, like the law forbidding perjury, is a rule of the second-best.<sup>152</sup> The spirit of an ideal humanistic law of mis-sent messages, like the spirit of an ideal humanistic law of lying, is this: Do what advances human flourishing—or what frustrates its opponents—in the case before you. At least sometimes, as Satan observes, the cause of human flourishing requires lying; here it requires exposing the private counsels of the Prince of Darkness to the light of legal scholarship. Thus, ironically, I am doing with respect to this rule precisely what Satan dreads in his memo: violating it to advance human flourishing in a way that the rule itself would like to accommodate, but cannot.

But I do so with deep reservation—and aware of a deeper irony. Even Satan and his lieutenants deserve their due, and that due surely entails private counsel among themselves. Having said that, however, I put myself in something of a pickle. Satan apparently believes that lies aimed at protecting privacy served the cause of humanity in the Lewinsky case; I, by contrast, believe that invading privacy best serves the same cause here. Thus, Satan's point that truth is not always paramount in a humanistic value scheme may apply to privacy as well.

### B. *Appropriateness of Publishing Satan's Work in a Jesuit Journal*

The general wisdom of publishing diabolical views has been long, if not universally, acknowledged. Perhaps ironically, some of the strongest pleas for Satan's publicity have come from his most implacable opponents. Milton, in his plea for unlicensed printing, famously declared, "I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal garland is to be run for, not without dust and heat."<sup>153</sup> Similarly, his co-religionists in Massachusetts taught the basic skill of reading very much with an eye toward knowing the devil, the better to resist his wiles.

Publication of the Devil's work in a scholarly law journal is also

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151. See, e.g., Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 310-12 (1995) (identifying and describing the characteristics of the "moral individualist" or "lawyer vigilante"); Rob Atkinson, *Br'er Rabbit Professionalism: A Homily on Moral Heroes and Lawyerly Mores*, 27 Fla. St. U. L. Rev. (forthcoming Fall 1999) (advocating the proposition that trickiness, or a lack of candor, is not per se immoral in lawyering).

152. Cf. Part I.C. (discussing why the contemporary law on perjury is a rule of second-best).

153. The Complete Poetical Works of John Milton at xxi (Douglas Bush ed., 1965). Bush, the editor and author of the introduction, called this sentence "the most beautiful and most Miltonic sentence in all his prose." *Id.*

well-precedented, if we emphasize the quality rather than quantity of the precedents. Admittedly, putting aside ghost-written pieces, there is only one item of assured authenticity, a review of Roberto M. Unger's *Knowledge and Politics*, under the signature of Satan himself. But it appeared in none other than the Stanford Law Review, through the good offices of Arthur Allen Leff, a Harvard Law School alumnus on the faculty of the Yale Law School.<sup>154</sup>

It could be objected that fare fine for Stanford is not necessarily fit for Fordham. The former, after all, is a non-sectarian school nominally neutral in matters involving Satan and his ancient foes; the latter, as "the Jesuit University of New York," can hardly stand on the sidelines while that oldest of rivalries plays itself out. But precisely this consideration cuts very much in the other direction, making Fordham exactly the right forum for this particular piece, an "outing" of the devil's views on truth-telling. Catholic theologians, at least since Aquinas's time, had seriously questioned Augustine's truth-absolutism,<sup>155</sup> essentially the position that Satan embraces in the secret memo published here. As principal, and highly successful, agents of the Catholic Counter-Reformation,<sup>156</sup> the Jesuits were widely assumed to be practicing what many theorists, Protestant<sup>157</sup> as well as Catholic, had preached: a more pragmatic, context-sensitive obligation to tell the truth.<sup>158</sup> As we have seen, that perspective on truthfulness, in Satan's own opinion, seriously undermines his work in the world. One cannot help but suspect, accordingly, that Satan himself had a hand in making "Jesuitical" a by-word for, to put it charitably, an improper attitude toward candor.<sup>159</sup> How like him to tar his opponents with the brush of a diabolical alliance—and how poetically just that his true position be revealed under the auspices of those whom he has so long

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154. See Arthur Allen Leff, *Memorandum*, 29 Stan. L. Rev. 879 (1977) (reviewing Roberto Mangabeira Unger, *Knowledge and Politics* (1975)).

155. See Bok, *supra* note 64, at 33-37 (1978) (tracing Christian positions on lying from Augustine through the Reformation).

156. See Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* 130-31 (1965) (describing the seventeenth-century struggles between Calvinists and Jesuits as the beginning of modern revolution politics and radical parties).

157. The principal Protestant exponent was the Dutch Calvinist jurist Hugo Grotius, in his *On the Law of War and Peace*, especially Book 3, Chapter 1. See Bok, *supra* note 64, at 37 ("Grotius helped to bring back into the discourse on lying the notion, common in antiquity but so nearly snuffed out by St. Augustine, that falsehood is at times justifiable.").

158. See Barnes, *supra* note 69, at 146 (recognizing that many interpreters have taken the position that the Scripture recognizes the legitimacy of certain lies).

159. See 8 Oxford English Dictionary 222, 222 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining "Jesuitical" as "[h]aving the character ascribed to the Jesuits: deceitful, dissembling; practising equivocation, prevarication, or mental reservation of truth"); see also Barnes, *supra* note 69, at 109 (citing Pascal's criticism of Jesuits in this regard). But see 8 Oxford English Dictionary 222 ("People only call a man jesuitical when they are beaten in an argument." (quoting Macdonald Hastings, *Jesuit Child*)).

maligned!

There is another reason, paradoxical but compelling, for airing the Devil's opinions on this particular subject. In trying to explain to his lieutenant the importance of lies to their common enterprise, Satan implicitly affirms the fundamental importance of truth-telling. As Sir Thomas Browne pointed out:

[S]o large is the Empire of Truth, that it hath place within the walls of Hell, and the Devils themselves are daily forced to practise it; . . . in Moral verities, although they deceive us, they lie not unto each other; as well understanding that all community is continued by Truth, and that of Hell cannot consist without it.<sup>160</sup>

Dr. Johnson agreed, noting that even the devils do not lie among themselves; their society, like all others, must rest on a foundation of truth-telling.<sup>161</sup> As Sisella Bok observes, "There must be a minimal degree of trust in communication for language and action to be more than stabs in the dark."<sup>162</sup> To make a successful foray out of Outer Darkness, even for the evil purpose of taking a stab at human flourishing, Satan and his siblings must be able to coordinate their actions. To that end, repulsive though it be, truth is a necessary means. This produces a kind of Kantian paradox of imperatives: if you want to convince someone that truth-telling is not categorically right for all possible situations, you have to conduct yourself so as to concede that it is right for this actual situation. To argue effectively that lying is not universally bad, you must prove in practice that lying cannot be universally good.<sup>163</sup>

### C. Problems with Crediting Satan's Views

Even if it is appropriate to publish Satan's confidential views on truth-telling in this forum, we are left with two questions. Are the opinions he expresses truly his own and, if they are, are they true?

#### 1. Are the Opinions in Satan's E-mail Truly His Own?

Is teaching Dunkelstern the truth about lying really the purpose that Satan had in mind in sending this particular e-mail? To put the question somewhat differently, who was his true, intended recipient?

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160. Thomas Browne, *Pseudodoxia Epidemica* (6th ed. 1672) (1646), available in *Yulgar Errors I.XI: A Further Illustration* (last visited Nov. 23, 1999) <<http://penelope.uchicago.edu/pseudoll.html>>.

161. See Bok, *supra* note 64, at 18-19.

162. *Id.* at 18; see also MacIntyre, *supra* note 15, at 312-14 (summarizing the argument that lying is logically derivative from truth-telling).

163. This is related to the classic liar's paradox: What are we to make of the statement by Epimenides of Crete that all Cretans are liars? See Titus 1:12-13 (King James). For discussions of this and related paradoxes, see Jon Barwise and John Etchemendy, *The Liar: An Essay on Truth and Circularity* 3-7 (1987), and James Cargile, *Paradoxes: A Study in Form and Predication* 226-303 (1979).

We have been assuming that it was actually intended for its ostensible addressee, Lucifer Dunkelstern, and inadvertently sent to me. In view of its sender's notorious cleverness, however, we should not dismiss out of hand another possibility: Satan may have directed it to me by design. One of the oldest tricks in the strategic book<sup>164</sup>—indeed, in the oldest books<sup>165</sup>—is to deceive or discomfit the enemy by providing them with false accounts of your own position.

Satan may have relished the prospect of posing for me the dilemma we have already seen between a general respect for privacy and a particular chance to advance human flourishing. A more likely, if less flattering, possibility is that Satan has bigger fish to fry. By purporting to side with those who defend lying under certain circumstances, he may be trying to dupe others into joining them. Brer Rabbit famously tricked Brer Fox and Brer Bear into throwing him into the briar patch by begging for the opposite.<sup>166</sup> Similarly, Satan may be trying to trick truth-absolutists into abandoning their moral high ground, what he takes to be the correct view that the truth should always be told, no matter what the consequences.

## 2. Are Satan's Opinions on Lying True?

There is, of course, a final problem. Even if we assume that Satan's e-mail embodies his real views about lying, how can we be sure that he is right? What if he is not lying about the nature of lying, but simply mistaken? To be sure, he has every incentive to get it right. To effect his announced policy of undermining human flourishing, he needs to understand the nature of lying and to convey that information accurately to his lieutenants. But he dismisses out of hand the traditional and widely held view that lying is inherently wrong.<sup>167</sup> In the terminology of technical philosophy, his method is not deontological, but teleological; his interest is in the consequences of lying, not whether there is any other sense in which lying might be morally wrong. We, whose interests are presumably opposed to his,

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164. See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* 191-94 (1982) (discussing military secrecy and strategy); Charles Greig Cruikshank, *Deception in World War II* (1979).

165. See, e.g., Homer, *The Odyssey* 61 (Robert Fitzgerald trans., Farrar, Straus & Giroux 1998) (n.d.) (describing the ruse of the Trojan Horse); *Joshua* 2:4-7 (King James) (recounting Rahab the Harlot's lie about the location of Israelite spies she had hidden in her house); *2 Kings* 6:13-19 (King James) (narrating Elisha's untruthful denial to a Syrian army that they were at the city of Dothan); see also, e.g., *Joshua* 8:3-29 (King James) (recounting Joshua's feigned retreat before the city of Ai to draw its defenders into an ambush).

166. See Julius Lester, *The Tales of Uncle Remus: The Adventures of Brer Rabbit* 10-16 (1987).

167. See Joseph Kupfer, *The Moral Presumption Against Lying*, 36 *Rev. of Metaphysics* 103, 103-05 (1982) (arguing that all lies have two inherent negative components and two associated contingent harms).

might need to explore this possibility.

Even as to consequences, his focus, at least in his e-mail, is limited. His only aim is to harm human beings or frustrate what he calls "human flourishing." If lying were evil in a way unrelated to harming human beings, then Satan, by his own admission, will have overlooked it. One cannot help wondering why he would not be interested in harming God, especially in light of what he tells Dunkelstern about their firm's original purpose. It seems unlikely that he is an atheist.<sup>168</sup> Perhaps he has learned from uncomfortable experience that direct assaults on his old Enemy are ill-advised. Perhaps he has found, through more successful experiments, that indirect attack is better. Perhaps he simply isn't able to fathom what the will of God could possibly be—other than the good of human beings.<sup>169</sup>

Even if this e-mail was an honest effort to fathom and discuss lying's consequences for human flourishing, however, Satan may well have erred. He does, to be sure, have a wealth of experience to draw upon—the whole of human history and literature. We have good reason to wonder, however, whether he is the ideal interpreter of the data at his disposal. He may have succeeded in measuring the consequences of lying, social and personal, only to fail in assessing the moral meaning of those consequences. It is one thing to see the full effects of lying, as a matter of fact; it is quite another to appreciate fully the manifold ways in which those effects might be good, or bad, for human beings.

To appreciate the latter, one would obviously have to understand fully what human flourishing itself entails. And on precisely that point, Satan may well have reached an impasse. If Socrates is to be believed—and even Satan seems to think that on this point he is—the only way to understand human flourishing is to live a life of honest inquiry with those who make answering that question together their foremost goal. But Satan, by his own admission, has a wholly different aim, and he is hardly the dialogic sort. Thus, in giving

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168. See *James* 2:19 (King James) ("Thou believest that there is one God; thou doest well: the devils also believe, and tremble.").

169. As to the last, others have converged on an obvious candidate:

O thou, wha in the Heavens dost dwell,  
Wha, as it pleases best thyself,  
Sends ane to heaven and ten to hell,  
A' for thy glory,  
And no for ony guid or ill  
They've done afore thee!

Robert Burns, *Holy Willie's Prayer*, reprinted in 2 Norton Anthology of English Literature 95 (5th ed. 1986). See generally 1 James M. Gustafson, *Ethics from a Theocentric Perspective* (1981) (advocating a theocentric, as opposed to an anthropocentric, ethic); 2 James M. Gustafson, *Ethics from a Theocentric Perspective: Ethics and Theology* (1984) (same). Even Judge Posner, an apparent secularist, noted that by "repeatedly lying under oath, he [Clinton] repeated swore falsely to God." Posner, *supra* note 10, at 144.

content to the concept of human flourishing, we may be left to our own joint inquiries, with little help from Satan's private reflections.

#### CONCLUSION

Here, then, we have what purports to be the devils' party line on lying, as applied to the facts of the Lewinsky case. From Satan's perspective, it was quite unfortunate that most Americans, after an initial wave of moral outrage, came around to thinking that the President and Ms. Lewinsky's lies were warranted, or at least much mitigated, by the circumstances of Starr's investigation, particularly his pursuit of intensely private facts only marginally relevant to the President's official conduct. The Lewinsky case stands, Satan seems to think, as a particularly galling example of a more general phenomenon: lies that advance rather than undermine human flourishing.

But it is not entirely clear how helpful to us this diabolical position paper can be. It may be a fake, designed to delude us into believing that truth-telling is not a moral absolute, and that perjury is not the ultimate offense against the judicial process. Or it may just be a mistake, a failed effort on Satan's part to understand human flourishing, the better to undermine it.

If the devils want to do better, ironically, they may have to engage us in dialogue, the humanists' avenue to human flourishing. But that way is not without its dangers and discomforts, especially for devils. To trip us up, they will have to travel a long way in our chosen direction by means that can hardly be to their liking. The more they lie about themselves, the further they fall from us, and the less they can learn about us; the less they lie about themselves, the closer they can draw to us, and the more they may become like us—or at least our better, more flourishing selves.

Surely there is a moral in that.